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IN THE

Supreme Court of the United States

October Term, 1956.

No. 839

DANIEL DUGAN, a Minor, By His Parents and Natural Guardians, DANIEL DUGAN and HELEN DUGAN, His Wife; and DANIEL DUGAN and HELEN DUGAN, His Wife, in Their Own Rights,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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INDEX TO PETITION.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
(1) The State Courts Failed to Grant a Hearing on the Dispositive Issue and Therefore Denied Petitioners Due Process of Law	11
(2) Failure of a State Court to Afford Such a Hearing Constitutes a Denial of Due Process Under the Fourteenth Amendment	13
(3) The United States Supreme Court Must Itself Review the Record	15
(4) Petitioner Raised the Federal Constitutional Issue Timely	18
CONCLUSION	20

TABLE OF CASES CITED.

	Page
Aetna Casualty & Surety Co. v. Flowers, 330 U. S. 464, 67 S. Ct. 798 (1947)	13
Avery v. State of Georgia, 345 U. S. 559, 73 S. Ct. 891 (1953)	14
Betts v. Brady, 316 U. S. 455, 61 S. Ct. 1252 (1942)	14
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 St. Ct. 451 (1930)	13, 15
Dean Milk Co. v. City of Madison, 340 U. S. 349, 71 S. Ct. 295 (1950)	13
Dowd v. United States, ex rel. Cook, 340 U. S. 206, 71 S. Ct. 262 (1951)	18
Ferenz v. Folsom, 237 F. 2d 46 (C. A. 3, 1956)	17
Frieze v. West American Ins. Co., 190 F. 2d 381 (C. A. 8, 1951)	13
Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077 (1943)	19
Gibbs v. Burke, 337 U. S. 773, 69 S. Ct. 1247 (1949)	18
Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115 (1940)	17
Hebert v. State of Louisiana, 272 U. S. 312, 47 S. Ct. 103 (1926)	14
Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 33 S. Ct. 312 (1913)	13
Interstate Amusement Co. v. Albert, 239 U. S. 560, 36 S. Ct. 168 (1916)	16
In Re Murchison, 349 U. S. 133, 75 S. Ct. 623 (1955)	14
Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437 (1915)	16
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305 (1914)	16
In Re Oliver, 333 U. S. 257, 68 S. Ct. 499 (1948)	14
Palko v. State of Connecticut, 302 U. S. 319, 58 S. Ct. 149 (1937)	14
Patterson v. United States, 15 U. S. 221 Wheat. 221 (1817)	12

TABLE OF CASES CITED (Continued).

	Page
Penna. R. R. Co. v. Pittsburgh, 335 Pa. 449, 6 A. 2d 907 (1939)	19
Postal Telegraph Cable Co. v. City of Newport, Ky., 247 U. S. 464, 38 S. Ct. 566 (1918)	13, 15
Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932)	19
Rooker v. Fidelity-Trust Co., 263 U. S. 413, 44 S. Ct. 149 (1923)	18
Saunders v. Shaw, 244 U. S. 317, 37 S. Ct. 638 (1917)	16
Southern P. Co. v. Schuyler, 227 U. S. 601, 33 S. Ct. 277 (1913)	16
Turner v. Commonwealth of Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352 (1949)	18
United States v. Ahtanum Irr. Dist., 124 F. Supp. 818 (D. C., E. D. Wash., S. D., 1954)	15
Waschak v. Moffat, 379 Pa. 441, 109 A. 2d 310 (1954)	17
Williams v. State of Georgia, 349 U. S. 375, 75 S. Ct. 814 (1955)	14
Williams v. Tooke, 108 F. 2d 758 (C. C. A. 5, 1940)	18

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 227	14
Restatement of Torts, § 339:	
Clause (a) et seq.	3, 4, 5, 6, 10, 11, 12, 14
28 U. S. C. A. § 1257(3)	2
United States Constitution:	
Amendment XIV, Section 1 et seq.	2, 3, 13, 16

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Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Daniel Dugan, a Minor, by His Parents and Natural Guardians, Daniel Dugan and Helen Dugan, His Wife, and Daniel Dugan and Helen Dugan, His Wife, in Their Own Rights, by their attorneys, respectfully petition that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on December 21, 1956.

Opinions Below.

The majority opinion of the Supreme Court of Pennsylvania and the dissenting opinion of Musmanno, J., Associate Judge, are reported at 387 Pa. 25, 27, 39 (1956). The opinion of the Court of Common Pleas of Philadelphia dismissing respondent's motion for judgment n. o. v. is unreported. This opinion of Davis, J., dated October 26, 1955 is included in the record from 272a-283a.

Jurisdiction.

The jurisdiction of this Court is invoked on the ground that the Pennsylvania Supreme Court in reversing the judgment of the Court below on an assumption of fact utterly unsupported by the record, denied petitioners an opportunity to be heard and defend their substantive rights. In so doing it set aside a jury finding, completely justified and adequately supported by the record, reversed the trial Judge, three Judges sitting en banc in intermediate review and this by a divided Supreme Court.

The certiorari jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257 (3) in that the rights, privileges and immunities, as guaranteed by the Fourteenth Amendment of the Constitution of the United States have been denied.

Question Presented.

Does a decision by the Pennsylvania Supreme Court reversing a judgment denying defendant-respondent's motion for judgment n. o. v., upon an assumption of facts which are not in the record and upon which plaintiffs-petitioners have had no opportunity to introduce evidence or present argument, violate the Fourteenth Amendment to the Constitution of the United States in that it deprives plaintiffs-petitioners of due process of law?

Statute Involved.

Amendment XIV, Section 1 of the Constitution of the United States, which reads:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis ours.)

STATEMENT OF THE CASE.

The decision of the Supreme Court reversing the judgment of the Court below and entering judgment for the defendant-respondent, was predicated solely on the ground that petitioners had failed to meet the conditions of clause (d) and only clause (d), of § 339 of the Restatement on Torts, which provides:

> "(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The Court admitted that the petitioners had met the burden of proof with respect to the remaining clauses (a), (b) and (c), which provide:

> "§ 339. Artificial Conditions Highly Dangerous to Trespassing Children.
>
> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

"(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

"(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and"

With respect to clause (d), the Pennsylvania Supreme Court in reversing the decision commented that "In every one of those cases, the hazard which caused injury to the child was confined to a small fixed location and could have been eliminated with little effort". The Court then observing that the respondent has 275 miles of electrified main train tracks within a thirty mile radius of Philadelphia, ruled that:

". . . if there were imposed upon the defendant, the requirement of fencing *the place* where this accident occurred, it would likewise be subject to the duty of fencing the *innumerable* places along its many miles of tracks frequented by trespassing children, to prevent them from clambering over cars of a train halted in transit." (Page 10 majority opinion.) (Emphasis ours.)

The specific situs of the accident was known to the community and the defendant railroad as the "jungle". It was a specific small limited recognized play area. There was no evidence that there were other localized areas used as a playground by children along the 275 miles of track. The Court's holding that the entire 275 miles of track within the Philadelphia area must be fenced or patrolled in order to sustain plaintiff's recovery must of necessity be predicated

upon a finding that conditions on the 275 miles of track are identical with those proven as "the condition" at the scene of this accident. *The record is bare of any such evidence.*

The sole issue before the Pennsylvania Supreme Court was whether under the circumstances of *this* place and *this* place alone, "the jungle"—where children notoriously played and trespassed, where freight cars were habitually stopped at a regular signal post for long periods of time, where high tension wires were only nineteen feet from the ground and thus within close proximity to the top of freight cars with ladders on their sides, where the fence had had a hole torn in it for a long period of time, where at least four other similar serious accidents to children had occurred in the same way and were known to the defendant, where the stopped car was manned by brakemen who could easily have left their seats and guarded the scene but a few feet away, where the control tower which knew in advance when trains would so stop could have been notified to direct mobile railroad police to the scene of a stopped car in this notorious play area—the risk of harm to life and limb of the children in this heavily populated area, did outweigh the utility to the railroad against adopting these simple no cost safety measures in this small area? In answering this question, the Court should clearly have considered the cost to the railroad of repairing the fence and/or directing employees already paid and on duty at this area *and this area alone* to maintain vigilance.

For the Court to go beyond the record and consider an irrelevant issue, namely, the cost of fencing and patrolling 275 miles of track through areas with respect to which there is (1) no evidence that they are densely populated (2) no evidence that there are slides, sluices, shrubs and other conditions maintained where children are likely to trespass, and (3) no evidence that the railroad company had any knowledge that such children were likely to trespass there—and to fail to consider the specific locus here

involved under the facts here in evidence as they complied with the requirements of § 339 (d)—is to deprive the petitioners of their day in Court guaranteed by the Fourteenth Amendment to the Constitution of the United States. *A decision that ignores the facts in the case upon which the jury and Court below relied and instead goes to facts not in the record, not in issue and then uses them as the very operative facts upon which, that decision is grounded, is to destroy and nullify the judicial process.*

A timely petition for reargument raising this question was denied by the Pennsylvania Supreme Court on December 21, 1956.

Daniel Dugan, a minor, by his parents and natural guardians, Daniel Dugan and Helen Dugan, his wife, and Daniel Dugan and Helen Dugan, his wife, in their own rights brought an action in trespass against the Pennsylvania Railroad Company for the loss of an arm and other serious personal injuries to Daniel Dugan, a minor, which occurred because of an accident on January 10, 1953 at 67th Street between Elmwood and Woodland Avenues, Philadelphia, Pennsylvania.

Daniel Dugan, aged eleven at the time of the accident, entered upon the tracks of the defendant railroad through a hole in the fence. He climbed on top of a box car which had been halted for more than an hour and a half. He came in contact with a catenary wire nineteen feet from th ground which formed a contact by arcing. The only witness was his younger brother. The jury returned a verdict in favor of the petitioners. The trial Judge denied a motion for judgment n. o. v. On appeal the Pennsylvania Supreme Court reversed.

The Pennsylvania Supreme Court described the scene of the accident as follows:

> "On 67th Street between Elmwood Avenue on the south and Woodland Avenue on the north, in the City of Philadelphia, there is a bridge which goes over the

defendant's electrified four-track main line between New York and Washington, on which freight and passenger tracks at this point run east and west. On the east side of 67th Street as one proceeds in a northerly direction towards the bridge there is John Bartram High School. Immediately to the north of the school is a high cyclone fence owned and maintained by the Philadelphia Electric Company. This fence separates the school property from a strip of land, between 40 and 46 feet wide, owned by the electric company between 66th and 67th Streets on the Elmwood Avenue side of the railroad right-of-way, and runs up to the bridge. On the north side and below the electric company's property is the railroad right-of-way which extends 50 feet, north and south, from the center line of the four tracks. For some time prior to the accident there had been a hole in the gate of the electric company's fence and the gate, which is immediately adjacent to 67th Street, was sometimes left open. Just inside of the fence and opposite the gate, is a 63 foot high tension tower owned by the Philadelphia Electric Company. On the steep banks leading down to the railroad tracks are hedges and undergrowth where, according to plaintiffs' evidence, children frequently played. Immediately east and next to the abutment of the bridge is a concrete sluice leading partway down the embankment . . ."

The record discloses that Sergeant Elijah L. Hammond, police sergeant for the railroad company and one of its witnesses admitted that he knew of the cases of *four* other boys who had been injured at that very place and in the identical manner, i.e., by climbing onto a box car and coming in contact with an electric wire (p. 121a-124a). In referring to the area in question he further testified at 124a:

"A. Well I haven't the record here but I have taken numerous boys home and notified their parents about

playing on this right-of-way in that particular vicinity. I have warned their parents. Where they were over nine years of age I hauled them into the station house. Otherwise I take them home and warn their parents about these children gathering there."

Sergeant Hammond also stated that ladders to the top of box cars are regular equipment on the cars which use the tracks in question (125a).

There was testimony that children habitually played on top of box cars which were left standing on the tracks at that point (132a).

The railroad company was well aware of the danger in this particular area. A retired railroad engineer who had been employed by the railroad company for forty-seven years testified that the railroad company had by a specific written order required the engineers to give a warning signal at 67th Street in order to protect against this very danger, i.e., children playing on or about standing box cars. It is notable that although this engineer regularly made the entire run from New York to Washington he mentions only three spots in the tremendous Philadelphia area in which engineers were *ordered* to give warning whistles—67th Street was one of these (173a). There is every indication that the entire thirty mile Philadelphia area was not equally dangerous or known to the railroad company to be dangerous (187a).

A Philadelphia police officer testified that not only was there a hole in the fence at the "jungle" but that nine times out of ten the gate was open (226a). He further testified that there was a well defined pathway doubtless made by citizens over many years who used this short cut across the tracks at this very point (225a).

The Assistant Road Foreman of Engineers also testified that the railroad had fences and warning signs in particularly specific dangerous places and that the railroad did not fence the whole main line (249a). This clearly indicates a realization upon the part of the defendant that all por-

tions of the track do not present the same problem. Another railroad engineer testifying for the railroad company pointed out that at Frankford Hills: "It is all open fields and there is nothing to stop them [children] except they can't fence the whole railroad from Washington to New York." (263a)

This casual remark which really indicates the totally different nature of the problem of safety at "the jungle", the scene of the accident, from that involving hundreds of miles of track was misunderstood and perverted by the Pennsylvania Supreme Court. The Court, building on this statement, equated the railroad track running through open fields with a railroad yard in the congested heart of the city, a yard just like Coney Island with sluices, slides, shrubs, a series of track where box cars were regularly halted for long periods of time by a fixed signal post, an area where children notoriously and openly played on all the appurtenances and structures as well as the box cars, an area so well known as a playground that it was even called "the jungle". There is no comparison between this "jungle"—which was surrounded by a fence alongside a public school, albeit a fence with a large hole in it and a gate which was habitually left open,—and tracks passing through open country.

The Court also ignored the evidence of *other* safety measures which the railroad could have taken without *any* additional cost whatsoever. It is undisputed that there were flagmen on this freight train which was temporarily halted, who were already on duty and were being paid anyway. An engineer testified as follows:

> "Q. If he is in the interlocking area (the scene of the accident) what does the flagman do then?
>
> "A. He looks around and sees that nothing is wrong with the train and walks around and one thing and another.
>
> "Q. Does he stay in the caboose?
>
> "A. No.

"Q. Is he supposed to stay in the caboose?
"A. No." (175a)

Obviously the railroad in advance of this accident recognized its duty to patrol such cars in vicinities such as this. The orders to do so were outstanding. The flagman here negligently ignored that order.

There would have been no cost to the railroad if it had required these employees to take elementary precautions to watch out for children at this particular narrow, isolated danger spot. It is further undisputed that the engineer on the freight train was in telephonic communication with the control at the Brill interlocking (61a). Upon deciding to delay this train the tower operator could easily have notified the railroad's local mobile private police to patrol the area (83a), when he knew that the freight train was halted in "the jungle". The control tower operator admitted that he could "pick up the phone any time". Hammond, its mobile private detective admitted that had he been notified that the train was stopping there, he would have and could have been there in just a few minutes. *As the tower operator knows in advance before the train stops there that it will do so, he could have had Hammond there even before the train came to a stop.* And this is at no expense at all. No additional cost whatsoever to the defendant railroad would be incurred by requiring such routine notification when a freight train was halted in "the jungle".

To say all of these things that the record so abundantly says is to indicate precisely those factors that must be weighed in an adjudication of the utility as against the risk as regards "*the* condition", i.e., "the jungle" of which § 339(d) speaks. And yet it is exactly these factors that the Court did not treat, because it refused to deal with *the* condition. Blinding itself to "*the* condition", it was led into this area *de hors* the record and *de hors* the due process clause of the Fourteenth Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT.

(1) The State Courts Failed to Grant a Hearing on the Dispositive Issue and Therefore Denied Petitioners Due Process of Law.

This petition presents a substantial federal question. The Pennsylvania Supreme Court has thus in effect reversed a valid judgment obtained by B against A because C, D, E, and untold unnamed others may possibly have separate and wholly independent and perhaps meritless causes of action against A. In this suit between A (The Pennsylvania Railroad Company) and B (Dugan), the Pennsylvania Supreme Court is attempting to adjudicate all possible claims against the Railroad without any evidence as to whether there are any such claims, and if there are such claims, their nature and scope, regardless of the necessary distinction that any meaningful judicial process demands must be made between them because of material factual differences.

The case at bar was tried before the jury on the theory that "the jungle" was an unsafe place, known to the defendant landowner to be unsafe and a place where children habitually played, that the utility to the landowner of maintaining such a place without proper protection was slight as compared to the risk to the children. Under § 339 of the Restatement, which is the law of Pennsylvania, it was the duty of the jury to make such a determination of fact with respect to the scene of the accident, known as "the jungle". The evidence presented both by plaintiffs and defendant was confined to this issue. The record is confined to testimony with respect to that area alone. The jury rendered its verdict on this question alone. The opinion of the learned trial Judge and the three Judges of the intermediate reviewing panel denying defendant's motion for judgment n. o. v. clearly show that this was the

sole question in the case. It had to be in the face of the unambiguous language of § 339(d): "*the* condition."

The Pennsylvania Supreme Court affirmed the rule of law of § 339 declaring "there can be no doubt that § 339 has been adopted in toto by this Court and is the law in this State". (Page 4 majority opinion.) The Court, building unsupported speculation upon unsupported speculation, then reversed solely because of possible liability which might be incurred by the railroad by reason of possible accidents which might occur at other places along the railroad tracks, where material factual differences would require a different result. If petitioners' rights are dependent upon the extent of the railroad's liability to other children unknown, *unexpected* and unidentified who may trespass on other *isolated* portions of the railroad track, then petitioners are certainly entitled to a hearing on the nature and validity of such indeterminate possible future claims. They should be permitted to prove that the remaining 275 miles of the defendant's track are not a notorious playground, that children do not habitually trespass there, that defendant is not aware of other accidents occurring to children along all of those 275 miles of track, and that the fences, where they exist, are not left open and unrepaired for months. If this is the dispositive issue, and the Pennsylvania Supreme Court has said that it is, then at the very least petitioners are entitled to a hearing on these questions. Petitioners also assert that the conditions with respect to the other 275 miles of track are irrelevant since the Court can adjudicate only with respect to the case at issue and not other possible claims. If the Pennsylvania Supreme Court erred in considering other areas, then its judgment should be reversed and the judgment of the Court below reinstated. If the jury finds only a part of that which is in issue, no judgment can be rendered upon it. *Patterson v. United States,* 15 U. S. 221 Wheat. 221 (1817). The jury verdict in this case was limited to a finding with respect to the scene of this particular accident and the utility to the rail-

road of maintaining this specific area alone as compared to the risk involved.

The right of a litigant to a hearing on the dispositive issue in the case cannot be doubted. Whenever this question has been timely raised, this Court has clearly and unequivocally held that the right to be heard on the dispositive issue is guaranteed by the due process clause. This Court has held in *every* such case that it is *required* to review the record to make an independent determination as to whether the Court below has afforded the petitioner a true hearing and an opportunity to present evidence on the dispositive issue. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 50 S. Ct. 451 (1930); *Postal Telegraph Cable Co. v. City of Newport, Ky.,* 247 U. S. 464, 38 S. Ct. 566 (1918).

When an appellate Court reverses on a ground which had not previously been adjudicated, the cause must be remanded for a determination on that issue. *Dean Milk Co. v. City of Madison,* 340 U. S. 349, 71 S. Ct. 295 (1950); *Aetna Casualty & Surety Co. v. Flowers,* 330 U. S. 464, 67 S. Ct. 798 (1947). The rule always adhered to has been clearly stated as follows:

> "Where such new issues are considered by an appellate court, the case will be remanded for decision by the trial court, of any uncertain or disputed facts related to such issues."
>
> *Frieze v. West American Ins. Co.,* 190 F. 2d 381 (C. A. 8, 1951).

(2) Failure of a State Court to Afford Such a Hearing Constitutes a Denial of Due Process Under the Fourteenth Amendment.

Action of the State Courts as well as of the executive or legislature is included within the ambit of state action under the Fourteenth Amendment. *Home Teleph. & Teleg. Co. v. Los Angeles,* 227 U. S. 278, 33 S. Ct. 312 (1913). While no specific procedure in the State Courts is guaran-

teed by the Federal Constitution, the Fourteenth Amendment does insure that in the State Courts "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions shall obtain". *Palko v. State of Connecticut,* 302 U. S. 319, 58 S. Ct. 149 (1937); *Hebert v. State of Louisiana,* 272 U. S. 312, 47 S. Ct. 103 (1926). A "fair hearing in the State Courts is thus a federally protected right." *Betts v. Brady,* 316 U. S. 455, 62 S. Ct. 1252 (1942). The right and duty of the United States Supreme Court to examine the fairness of procedures in state criminal trials is no longer open to question. *In Re Oliver,* 333 U. S. 257, 68 S. Ct. 499 (1948); *Avery v. State of Georgia,* 345 U. S. 559, 73 S. Ct. 891 (1953); *Williams v. State of Georgia,* 349 U. S. 375, 75 S. Ct. 814 (1955). Even though the practice of the State Court is approved by the State legislature and the highest Court of the State, the United States Supreme Court will reverse a decision when there has not been a hearing which meets these minimal standards of fairness. *In Re Murchison,* 349 U. S. 133, 75 S. Ct. 623 (1955).

When a federal constitutional question is raised, the Supreme Court "must of necessity determine that question". See Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 227, pointing out that except for "political questions", involving judicial abstention, this is the *duty* of the Courts. The question cannot be avoided since the Pennsylvania Supreme Court so clearly predicated its decision upon an issue which had not been litigated and upon an assumption of fact for which there is no support in the record. If the Pennsylvania Supreme Court had simply repudiated the rule of § 339 of the Restatement, that might have been error, but no federal question would have been raised. Judgment should be reinstated for the petitioners here on the jury verdict. At least the matter should be remanded for fair, full review of the new, unpleaded, unproven issue upon which the Court below now turns the case.

(3) The United States Supreme Court Must Itself Review the Record.

In every reported decision in which this question has been timely raised, the United States Supreme Court has held that it is the duty of the Supreme Court itself to review the record to determine whether the adjudication has been predicated upon the facts and the issues litigated.

In *Brinkerhoff-Faris v. Hill, supra,* the Missouri Court refused an injunction against the collection of an allegedly discriminatory tax on the grounds that the petitioners had not exhausted their legal remedies. A prior decision had held that there was under the statute no administrative relief. The State Supreme Court reversed the earlier ruling and held that such legal relief existed. When this decision was rendered, the time for taking an administrative appeal had expired. This Court granted certiorari and reversed. Mr. Justice Brandeis, speaking for a unanimous Court, held that the litigant must be given an opportunity to be heard on the dispositive issue. In *United States v. Ahtanum Irr. Dist.,* 124 F. Supp. 818 (D. C., E. D. Wash., S. D., 1954), the District Court pointed out that due process of law requires that the cause of action and the defense be delineated to the knowledge of the parties before judgment.

When a State Court has acted upon a basis of fact which has no support in the record, the United States Supreme Court will reverse and remand the cause. In *Postal Telegraph Cable Co. v. City of Newport, Ky.,* 247 U. S. 464, 38 S. Ct. 566 (1918), the State Court brushed aside the defendant's argument and held that the matter was concluded by a prior suit. The defendant had not been a party to the prior suit and thus the decision of the State Court was totally unsupported by the record. Upon a petition for certiorari, this Court reversed and remanded holding that the defendant must have an opportunity to be heard on the dispositive issue and that failure by the

State Court to accord such a hearing constituted a denial of due process in violation of the Fourteenth Amendment.

In *Southern P. Co. v. Schuyler,* 227 U. S. 601, 33 S. Ct. 277 (1913), the United States Supreme Court also granted certiorari on an allegation that the State Supreme Court had decided the case on grounds which had no support in the record. On such an allegation of denial of constitutional rights, the Supreme Court held that it *must* review the facts.

Similarly, in *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 34 S. Ct. 305 (1914), the Supreme Court held that it would review a finding of a State Court that allegedly was not supported by evidence and thus denied a federal right. Again in *Interstate Amusement Co. v. Albert,* 239 U. S. 560, 36 S. Ct. 168 (1916), the Supreme Court reviewed the record in the State Court because, the Court ruled, if it was not supported by evidence the plaintiff would be denied due process. See also *Norfolk & W. R. Co. v. Conley,* 236 U. S. 605, 35 S. Ct. 437 (1915).

Mr. Justice Holmes considered this problem in *Saunders v. Shaw,* 244 U. S. 317, 37 S. Ct. 638 (1917). The plaintiff had offered evidence that the lands in question would not be benefited by the tax sought to be imposed, and, therefore, should not be taxed. The Court excluded the evidence as to benefits, but it was put on the record. On appeal, the State Supreme Court held that the land was not taxable because it would not be benefited. The defendant complained that because of the ruling as to evidence he had been denied the opportunity to present his evidence as to lack of benefit. This Court held that he had raised a valid question of deprivation of rights under the Fourteenth Amendment. No doubt was entertained as to the fact that the action of the State Supreme Court was violative of defendant's right to present evidence and be heard. A difficult procedural problem arose because petitioner had not assigned the ruling of the State Court

as error. The United States Supreme Court, however, resolved the problem by granting the writ because failure to do so would deny the petitioner an opportunity to present evidence. So important did the Court deem this right to have the opportunity to present evidence, that it overlooked the well established rules of procedure. Failure to do so would have constituted a deprivation of due process in violation of the Fourteenth Amendment. This line of decisions has never been overruled or modified. See *Hansberry v. Lee,* 311 U. S. 32, 61 S. Ct. 115 (1940). It should not be. The right to a hearing on the dispositive issue is elemental. Without it any talk of due process is mere verbiage.

In two recent cases, dissenting opinions have raised this issue. In each case, the majority decision affirmed the Court below, on the basis of the evidence presented. In his dissenting opinion in *Waschak v. Moffat,* 379 Pa. 441, 109 A. 2d 310 (1954), Justice Jones (now Chief Justice) pointed out that the majority opinion worked a denial of plaintiff's right to a day in Court on a material and crucial issue which was raised for the first time in the Superior Court. In *Ferenz v. Folsom,* 237 F. 2d 46 (C. A. 3, 1956), Judge McLaughlin, dissented because the referee failed to consider evidence submitted by the claimant. In both of these cases there was a substantial doubt as to whether adequate consideration had been given to the evidence upon which the decision was predicated. In the case at bar, it is apparent from the face of the opinion that the Pennsylvania Supreme Court acted upon an assumption of fact totally unsupported by the record. The dissenting opinion by Musmanno, J. bares this with almost disdainful vigor.[1]

1. "The Majority, however, in discussing this phase of the case refuses to restrict the locus in quo to 67th Street where the accident occurred and where the Jungle was located, but speaks of fencing in vast distances and immeasurable areas over the 275 miles of electrified main tracks! There is no argument in logic so wearisome as that which seeks to prove a point by an irrelevant comparison or one so

(4) Petitioner Raised the Federal Constitutional Issue Timely.

It is only when petitioner fails to raise the issue timely that certiorari has been denied. See *Helis v. Ward,* 308 U. S. 365, 60 S. Ct. 283 (1939). The clear implication of this opinion is that the decision of a state appellate Court based upon a theory totally different from that on which the case was tried gives rise to a federal constitutional question if properly presented. The unconstitutionality of a State Court judgment may be raised only in the United States Supreme Court. *Rooker v. Fidelity-Trust Co.,* 263 U. S. 413, 44 S. Ct. 149 (1923); *Williams v. Tooke,* 108 F. 2d 758 (C. C. A. 5, 1940). In the case at bar, petitioners filed a timely petition for reargument squarely raising this constitutional question.

The United States Supeme Court has not hesitated to reverse the decisions of the highest Courts of the several states in criminal matters when their procedures have not accorded a fair hearing. *Turner v. Commonwealth of Pennsylvania,* 338 U. S. 62, 69 S. Ct. 1352 (1949); *Gibbs v. Burke,* 337 U. S. 773, 69 S. Ct. 1247 (1949); *Dowd v. United States, ex rel. Cook,* 340 U. S. 206, 71 S. Ct. 262 (1951). As a result, the entire administration of justice throughout all of the States has been improved and its integrity protected. Similarly, in civil litigation, when State Courts

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exaggerated in scope as to make it wholly foreign to the discussion. It is like equating an ant hill with Mt. Everest because they are both protuberances from the earth's surface, or comparing a flea with an eagle because they both fly, or a monkey with an elephant because they both eat peanuts. It is absurd to say that because the railroad would be required to fence away the Jungle from the tracks, it would be required to fence the whole length of its 275 miles of electrified main tracks or even to fence areas where a child or two has been seen playing beside the right-of-way or climbing on a car. Liability only arises where there is a known dangerous practice which a railroad company can avoid. Thus, it is no answer to say that if the railroad would be required to erect a fence some 20 or 30 feet long, at a cost of some one or two hundred dollars, it would be called upon to build a fence 275 miles long." (Page 12 Dissenting Opinion.)

violate elementary and minimal requirements of procedural fairness, the only remedy lies in a writ of certiorari. The cavalier disregard of the record by an appellate Court and its substitution of theory for facts deprives the litigant of his day in Court and makes a mockery of due process of law. It is a recurrent problem which is substantial and of public importance. This Court must ever be on guard to prevent any and all undermining of the substance of the judicial process. This Court may overlook error of law, the pronouncement of strange, unorthodox propositions of legal theory, the espousal of minority points of view on established or even axiomatic principles. But Courts, however erroneous their views, must at least adjudicate upon the basis of the record. Nothing is more basic than that a Court may not substitute its theories for evidence. Nor may it decide a case upon facts not before it, nor decide issues not presented, nor raised by the pleadings or the evidence. It is surprising that the Pennsylvania Supreme Court did do just that in this case as it has firmly held heretofore that a variation between allegata and probata is fatal in civil actions in this state *Penna. R. R. Co. v. Pittsburgh,* 335 Pa. 449, 6 A. 2d 907 (1939) on the theory that a judgment resting on a record in that posture would be violative of due process. Yet here it has itself decided this case on a theory not expressed in the allegata and on which there was an absolute void as to probata. There has been a serious deprivation of due process in this case. Enforcement of due process, will necessarily also insure the right to trial by jury when guaranteed by the several state constitutions. It will put to end mere lip service to this invaluable right. This Court has since *Galloway v. United States,* 319 U. S. 372, 63 S. Ct. 1077 (1943) nobly protected this right in the Federal Courts. It is no less important in the several State Courts. Of course, a state may deny the right entirely. But once granted, it must in its operation comply with fairness and due process. *Powell v. State of Alabama,* 287 U. S. 45, 53 S. Ct. 55 (1932).

Conclusion.

The question herein presented is recurrent on the exercise of appellate jurisdiction by the State Courts. It is substantial and of public importance.

Respectfully submitted,

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Counsel for Petitioners.

FILED
MAR 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 839.

DANIEL DUGAN, a Minor, By His Parents and Natural Guardians, DANIEL DUGAN and HELEN DUGAN, His Wife; and DANIEL DUGAN and HELEN DUGAN, His Wife, in Their Own Rights,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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TABLE OF CONTENTS OF APPENDIX TO PETITION.

	Page
Opinion of the Court of Common Pleas of Philadelphia County	1a
Final Judgment of the Court of Common Pleas of Philadelphia County	11a
Opinion of the Supreme Court of Pennsylvania	12a
Dissenting Opinion of Musmanno, J., of the Supreme Court of Pennsylvania	24a
Plaintiffs-Appellees' Petition for Reargument in the Supreme Court of Pennsylvania	46a
Brief in Support of Plaintiffs-Appellees' Petition for Reargument in the Supreme Court of Pennsylvania	50a
Appellant's Reply to Plaintiffs' Petition and Brief for Reargument in the Supreme Court of Pennsylvania	59a
Order Denying Reargument	61a

APPENDIX TO PETITION.

OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

October 26, 1955.

JOHN MORGAN DAVIS, *J.*

Daniel Dugan, a minor, by his parents, Daniel and Helen Dugan, and with his parents in their own right, sued the Pennsylvania Railroad Company for his loss of an arm and other serious personal injuries suffered by the minor plaintiff through severe electric shock from a high power transmission line while on top of one of defendant's freight trains.

The minor plaintiff was awarded $40,000.00 damages and his parents $10,000.00 damages by the jury. Defendant's motion for a new trial was withdrawn at the argument and its motion for judgment non obstante veredicto was subsequently dismissed. Judgments were entered on the verdicts and appeals taken. We now file our reasons for dismissing defendant's motion for judgment non obstante veredicto.

The accident occurred on January 10, 1953, at 1:30 o'clock in the afternoon, on the defendant railroad's right of way at 67th Street between Elmwood and Woodland Avenues in the City of Philadelphia. The minor plaintiff was then eleven years old. That day while on the way to the movies with his younger brother, Harry, then eight years old, he tarried for a half an hour, playing along the railroad right of way. Intending to cross over to the other side, he had climbed the ladder onto the top of a stopped freight car; pointed toward an overhead wire and admonished his younger brother not to "fool around the wires", when electricity arced from the wire into and through his

body. His arm required partial amputation, crippling him for life.

The railroad maintains and operates four of its main line freight and passenger tracks between New York and Washington at the place where the accident occurred, two tracks for northerly trains and two for southerly trains. It operates approximately two hundred trains thereon daily in both directions. Top speed limits vary from 30 to 75 miles per hour northbound and 45 to 75 miles per hour southbound. There were bridges for vehicular and pedestrian traffic over these tracks at 57th, 65th, 70th and 71st Streets, as well as a foot bridge at 66th Street solely for pedestrian travel.

The Philadelphia Electric Company owned a strip of land adjoining, but considerably higher than, the railroad's property on which it maintained a high tension electric tower. Its tower was enclosed in a cyclone fence, the door to which was left unlocked and through which a sizeable hole had remained torn for some time. A concrete drainage sluice ran down the bank between the electric company's property and the railroad's road bed. There was a large hedge at the top of the bank, a maze of paths through it and "caves" in it.

The minor plaintiff, and his brother Harry, played here on January 10, 1953, as they usually did while on their way to the movies, crawling through the hole in the fence, playing on the bank, crawling through the hedge, sliding down the sluice, digging in the caves, and tumbling. This area in which they played was called, and used extensively by them and other children as, a "jungle".

Defendant railroad had this day stopped a freight train at 62nd Street which, because of its length of sixty-one cars, extended to and beyond this play area at 67th Street. It remained there for forty-four minutes. After playing for a half hour, and then intending to cross the railroad tracks, proceed up the far bank and continue to the movies, the minor plaintiff climbed up the ladder onto a freight car and was stricken down as stated.

There was testimony that freight trains frequently were stopped at this and other points in the immediate area for varying lengths of time, not however usually as long as on the day in question. There was also testimony that children habitually, and to defendant's knowledge and notice, played around and on the tracks as well as under and on defendant's stopped trains.

Defendant does not complain of any trial error, having withdrawn its motion for a new trial. Defendant concedes that the record supports the conclusion that the minor plaintiff was free from contributory negligence and raises the sole issue of whether the record supports the jury's finding that defendant was negligent.

The case was tried and submitted to the jury on the theory codified in Section 339 of the Restatement of Torts, which provides:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> "(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> "(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
>
> "(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> "(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

We shall review the record as Section 339 above applies thereto and in doing so shall consider the facts and the reasonable inferences therefrom in the light most favorable to the plaintiff, as we are required to do. *Harris v. DeFelice,* 379 Pa. 469, 471.

That defendant railroad owned and possessed the land and maintained its tracks, trains and catenary power lines thereon is not questioned.

The initial element required to establish liability under Section 339 is that defendant railroad knew or should have known that children were likely to trepass at the place of the accident.

Five witnesses, Carmen Castellano, June Peck, Daniel Dugan, Harry Dugan and Harry W. Brower all testified concerning children playing for many years on the bank, in the hedge, digging caves, tumbling and sliding down the side of the bank and playing on, around and under trains which stopped there. Walter G. Bottomley, a railroad rules examiner, testified that defendant railroad knew of the tendency of children to play there. Complaints and reports thereof had been made to the railroad police. Sergeant Elijah L. Hammond, railroad police employee, albeit reluctantly, admitted that he had heard of four other children besides plaintiff being injured by electrical shock in substantially the same manner and vicinity, in the three years between 1945 and 1948.

To conclude as a matter of law from such evidence that defendant railroad neither knew nor should have known that children were likely to play at the place of injury would be intellectually dishonest.

The next element required to be proven to establish defendant's liability is that defendant railroad knew and realized, or should have known and realized, that its stopped train involved an unreasonable risk of death or serious bodily harm to trepassing children. In proof of this element the jury had the testimony of Harry W. Brower, a retired Pennsylvania Railroad engineer, that defendant

promulgated rules for its engineers which required them to blow special warning whistles for children when in this section. It has the testimony of Sergeant Hammond, a railroad policeman for forty-nine years, and of William H. Lindsay, Jr., a railroad maintenance executive, that children were chased away from the tracks when they saw them in the vicinity and also were taken to their parents or turned over to city police. This clearly supports the conclusion that defendant railroad knew and realized, or should have known and realized, that the children's playing around and climbing over and under cars involved unreasonable risk of death or serious harm. If that does not, then its knowledge of four previous similar electrical accidents, as admitted by Sergeant Hammond, does.

The third essential element of proof required is that children, because of their youth, do not discover the condition or realize the risk involved in intermeddling or coming into the area made dangerous by the condition. The minor plaintiff convincingly testified that he did not realize the risk involved in pointing at the catenary power transmission line. To him, the inherent danger in the wire was that his brother Harry would swing on it "like Tarzan". As for trespassing, crawling through the hole in the fence, playing on the bank in the jungle, sliding down the sluice, crossing the tracks and climbing over the stopped trains, minor plaintiff knew he should not do such things, but he did not realize the serious risk involved. He did it because it was "fun". He convincingly demonstrated that he did not know that trains ran by electricity and did not know anything about the dangers of electricity. In the light of the evidence received, it certainly was not for the court to determine otherwise as a matter of law.

The last element to be proven is that the risk to children could have been obviated without serious interference with the operation of the railroad. The testimony reveals that there were in the area railroad personnel including police, maintenance men, flagmen, and trainmen whose

normal duties might well have been adapted to include periodic inspection of stopped trains, without detracting from their primary duties or prohibitively adding to the cost of operation. No testimony was offered that the train crew could not have reasonably inspected the train. The minor plaintiff had been playing there a half hour before his tragic accident.

It is obvious that trains must run over the four tracks of defendant and that this is a proper use of defendant's land and facilities. However, it is little to ask that defendant instruct its crews, on trains stopped for signal, to patrol the train they are assigned to protect. In so patrolling they accomplish the protection they are employed to provide and in the process may avoid life-long injury or death to a trespassing child who does not realize the dangers inherent in the necessary implements and facilities of a modern railroad.

It was not unduly burdensome to dispatch railroad police or train crew members to examine the train during a forty-four minute halt, knowing as defendant did, or should have known, of the propensity of children over the years to play there. Again we say that whether or not these elements were proven were for the jury and not for the court to decide as a matter of law.

We are of the opinion that the record contains sufficient evidence of negligence to entitle plaintiff to have a jury determine whether he met the burden of proof that defendant did not act with due care under the circumstances.

As Mr. Justice Moschzisker said in *Gawronski v. McAdoo,* 266 Pa. 449, at page 454:

> "We have repeatedly held that, where a railroad company permits its yards or tracks to be used as a playground for children, the corporation is required to operate its rolling stock with due care to avoid injuring such children, and that the ordinary rule, as to the limited measure of duty owing to trespassers, is inap-

plicable: O'Leary v. Pittsburgh, etc. R. R., 248 Pa. 4, 9; Counizzarri v. P. & R. Ry., 248 Pa. 474, 477, 478; Francis v. B. & O. R. R., 247 Pa. 425, 429; as to the duty toward children, see also Toner v. P. R. R., 263 Pa. 438, 440; Petrowski v. P. & R. Ry. Co., 263 Pa. 531, 536; Piepke v. P. & R. Ry. Co., 242 Pa. 321, 326.

"We have held likewise that one fixed with a duty to regard the safety of children is obliged reasonably to anticipate they will do the ordinary and natural things which may be looked for from them under the circumstances."

Defendant contends that this case is governed and controlled by *Malischewski et al. v. Pa. R. R. Co. et al.*, 356 Pa. 554. Therein, Judge Finletter, whose memory we revere, and in his lifetime President Judge of this court, as trial judge entered a nonsuit against the plaintiffs in what defendant argues is a similar case and was affirmed on his opinion by the Supreme Court. In that case, a child was injured by contacting overhead live wires as he climbed over a detached coal car standing at the defendant's railroad station. Judge Finletter found that nothing about the scene of accident resembled a *playground* and that the area had to be open to give access to the station platform and trains. In our opinion the similarity of the cases lies only in the fact that the injured boy's arm came in contact with defendant's electricity and he was badly hurt.

It does not follow that because defendant railroad was not liable in one case in which a child was injured by its electricity that it thereafter would not be liable in other cases wherein children are injured by such electricity. Liability only follows proof of negligence, not proof of injuries.

Judge Finletter ruled as a matter of law that in the *Malischewski* case, supra, there was no proof of negligence. The negligence that plaintiff therein alleged and failed to prove was that "the scene of the accident was a playground which the railroad permitted to be used by children and which it should have guarded to prevent them so using it".

In the instant case, plaintiffs' theory is not that defendant railroad was negligent in not prohibiting children from playing at the scene of the accident, but rather that defendant railroad was negligent in stopping its train without taking reasonable, protective measures, with knowledge, real or constructive, that young, unsuspecting, children would trespass there. Its negligence was not in failing to prevent children from trespassing there, but rather in using its land as it did; in stopping its train where it did without invoking such protective procedures as the circumstances dictated.

In the *Malischewski* case, the scene of the accident was a railroad station, and nothing else. It consisted only of tracks, passenger platforms, and stairs to give access to the platforms and trains. There was nothing there that looked like, was used as, or constituted a playground as alleged.

Not so in the present case. The banks of the railroad, with the hedge, paths, caves, sliding sluice or chute, and "jungle" was the minor plaintiff's as well as other children's playground, and known to the railroad to be such. Children were always there when school was out. Children were on and under stopped cars. That is the difference between the instant case and the *Malischewski* case. We cannot conclude that children were not likely to trespass there in the face of such overwhelming evidence that they in fact did trespass there and were known to the railroad to do so, through the years. As was held in *Scibelli v. Pennsylvania R. R. Co.*, 379 Pa. 282, at page 286, "The playing of various games by children on the land adjoining the defendant's right of way was of sufficient frequency to bring it within the accepted definition of a playground."

Our Supreme Court, in *Patterson v. Palley Mfg. Co.*, 360 Pa. 259, at page 266, in commenting on an action under Section 339 of the Restatement, through Justice Stern (now Chief Justice) said: "The basis of liability in cases such as this rests upon the well established principle that a person in possession of land who knows that children

commonly come thereon, that its condition is such as to make it peculiarly attractive to their inquisitive and playful instinct, and that their playing there is likely to be attended with danger, must take all reasonable measure to avoid resulting injury to such children; *Reichvalder v. Borough of Taylor,* 322 Pa. 72, 185 A. 270; *Bonczek v. Philadelphia,* 338 Pa. 484, 13 A. 2d 414; *Thompson v. Reading Company,* 343 Pa. 585, 23 A. 2d 729; *Allen, Administrator v. Silverman,* 355 Pa. 471, 50 A. 2d 275."

As concerns the onus of protecting children, we agree that there is no duty to fence in the railroad right of way. The jury was so charged. We do not comprehend that subsection (d) of section 339 of the Restatement of Torts contemplates or imposes on the possessor of land, the absolute burden of positively preventing injury. Rather we are of the opinion that the law contemplated preventative measures, commensurate with the risks involved, which may be reasonably implemented without unduly interfering with or burdening defendant's operation. Fences are not necessary. Policemen may be necessary. Train crews of stopped trains in addition to calling the station, placing flares, checking hot boxes and otherwise protecting the train and property of the railroad, may have to walk the length of the train at specified intervals to protect the interests of others. Whether they have to or not, whether their superiors must prescribe such procedures or not, whether such procedures are unduly burdensome, are all questions for the jury and not legal questions for the court.

In *MacDougall v. Pennsylvania Power and Light Co.,* 311 Pa. 387, 396, the Supreme Court held: "Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question."

The utility of railroads is for the betterment of man and not for the destruction of man. It has been said that the history of this country has been written by the development of the railroads. Such progress and development does not let us imply any license to the railroads to operate blindly. Overpasses and underpasses eliminating grade crossings are no longer prohibitively expensive as in years gone by. Why not? Not because of reduced costs of construction—rather because of increased value of life as compared with the utility of the "Iron Horse".

It is not unreasonable to expect and therefore require that minimal measures be taken to prevent repetitious electrical injuries of children in the vicinity of this accident during prolonged stoppages of trains.

The theory upon which this case was tried was that defendant railroad was liable to young trespassing children under certain circumstances. Therein lies the difference between this case and *Scibelli v. Pennsylvania R. R. Co., supra.* There, recovery was denied because of failure to prove permission or acquiescence in the use of the owner's property. This is not involved in the present case. There need be no permission, acquiescence or license by defendant railroad to the minor plaintiff to climb its cars. At best he was only a trespasser. There must be knowledge, real or constructive, on the part of defendant railroad that children are likely to trespass there. The test is not did the owner acquiesce in the trespass, but rather did he exercise reasonable care to prevent what was foreseeable from past experiences; what could and did happen to trespassing children.

The cause of action is peculiarly one accorded young trespassing children. As was said in *Thompson v. Reading Company,* 343 Pa. 585, at page 599, "Young children have no foresight and scarcely any apprehensiveness of danger. This is a circumstance which those owning instrumentalities potential for harm must bear in mind, for it is every

individual's duty to use toward others what due care *then* and *there* requires."

To grant defendant's motion for judgment non obstante veredicto would be tantamount to ruling as a matter of law that defendant railroad owes no duty to trespassing children in and around the area in question. It is only just and right that defendant owe a duty of care toward trespassing children after successive accidents involving such children.

Just as experience has taught defendant railroad it must reduce train speeds while rounding curves unless they would chance a wreck, so experience should have taught defendant railroad it should patrol stopped trains in the 67th Street area to prevent children from being injured by its use of electricity. After four such tragic electrical accidents, defendant railroad should have known of the likelihood of recurrence, and for that reason it owed a duty to trespassing children such as the minor plaintiff. Whether it failed in that duty under all of the evidence was for the jury and not for the court as a matter of law.

It is for these reasons that we dismissed defendant's motion for judgment non obstante veredicto, and entered judgment on verdict in plaintiffs' favor.

DAVIS,
J.

FINAL JUDGMENT OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

August 4, 1955. Judgment entered on the verdict, 5:30 P. M.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 330 and 331, January Term, 1955.

APPEALS FROM THE JUDGMENTS OF THE COURT OF COMMON PLEAS NO. 2 (TRIED IN COURT OF COMMON PLEAS NO. 4) OF PHILADELPHIA COUNTY, AS OF MARCH TERM, 1953, NO. 821.

DANIEL DUGAN, A MINOR, BY HIS PARENTS AND NATURAL GUARDIANS, DANIEL DUGAN AND HELEN DUGAN, HIS WIFE; AND DANIEL DUGAN AND HELEN DUGAN, HIS WIFE, IN THEIR OWN RIGHTS

v.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT IN NO. 330 AND NO. 331.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

CHIDSEY, *J.*

This is an action in trespass brought on behalf of Daniel Dugan, a minor, by his parents and by them in their own right to recover damages for serious injuries which the minor sustained from an overhead electric power line when he climbed to the top of a train of the defendant Pennsylvania Railroad Company, stopped temporarily at a signal on one of its main line tracks. The jury returned a verdict in favor of the minor plaintiff for $40,000 and for his parents in the sum of $10,000. The defendant filed a

motion for a new trial which was withdrawn and a motion for judgment non obstante veredicto which was dismissed by the court below. From the final judgment entered on the verdicts for the plaintiffs, defendant has appealed.

The proper determination of this case depends on the application of § 339 of the Restatement, Torts, to the evidence presented at the trial. The area where this accident occurred may be described as follows: On 67th Street between Elmwood Avenue on the south and Woodland Avenue on the north, in the City of Philadelphia, there is a bridge which goes over the defendant's electrified four-track main line between New York and Washington, on which freight and passenger tracks at this point run east and west. On the east side of 67th Street as one proceeds in a northerly direction towards the bridge there is John Bartram High School. Immediately to the north of the school is a high cyclone fence owned and maintained by the Philadelphia Electric Company. This fence separates the school property from a strip of land, between 40 and 46 feet wide, owned by the electric company between 66th and 67th Streets on the Elmwood Street side of the railroad right-of-way, and runs up to the bridge. On the north side and below the electric company's property is the railroad right-of-way which extends 50 feet, north and south, from the center line of the four tracks. For some time prior to the accident there had been a hole in the gate of the electric company's fence and the gate, which is immediately adjacent to 67th Street, was sometimes left open. Just inside of the fence and opposite the gate, is a 63 foot high tension tower owned by the Philadelphia Electric Company. On the steep banks leading down to the railroad tracks are hedges and undergrowth where, according to plaintiffs' evidence, children frequently played. Immediately east and next to the abutment of the bridge is a concrete sluice leading partway down the embankment. Bridges for pedestrians and vehicles cross the tracks overhead at 71st, 70th, 67th, 65th, 63rd and 62nd Streets, and a foot bridge crosses

at 66th Street. On both sides and on the street level of the 67th Street bridge are high, solid sheet metal fences which appellees admit in their brief made it impossible for anyone to reach the railroad's electrified, catenary wires running underneath the bridge. On these metal fences are signs that say "danger, live wire, keep off". From 160 to 200 passenger and freight trains—one every nine minutes—daily pass in both directions on the railroad's tracks at this point at speeds up to 75 miles per hour. The two northernmost tracks are used for trains proceeding toward Washington, while the two southernmost tracks are for trains moving toward the center of Philadelphia. Train movements in this area are controlled by defendant's signal tower operator at Brill Tower in the vicinity of 61st Street. Because of train movements in and out of the Grays Ferry yard area which is to the east of Brill Tower, trains on the second track going toward Philadelphia are sometimes stopped at the signal bridge near 62nd Street. Evidence adduced by plaintiffs showed that when and how long trains might be stopped in transit by the Brill Tower operator was unpredictable and depended on conditions as they arose. During the month immediately preceding the accident the train in question, known as ME-2, passed under the 67th Street bridge practically daily and was delayed six times for periods of 8, 11, 14, 17, 44 and 59 minutes.

On the day of the accident, a Saturday afternoon, the injured minor, who was 11½ years old, left his home with his 8-year old brother for the purpose of going to the movies. They walked north on 67th Street until reaching the 67th Street bridge where they climbed through the hole in the electric company's gate and played around the hedges and the concrete sluice for approximately one-half an hour which, according to their testimony, they had done on a number of occasions before. A long freight train, ME-2, consisting of 61 cars and extending about three-fifths of a mile in length, was standing on the second track. The minor plaintiff could not see either end of it from where

he was standing at the foot of the 67th Street bridge. This freight train was temporarily stopped because of train movements ahead for approximately 44 minutes. Desiring to cross the tracks so as to continue on to the movies, the minor plaintiff crossed over the first track and climbed up the side ladder of one of the box cars located one or two car lengths east of the bridge. Arriving on top, he pointed to the overhead catenary wire, which was approximately 19 feet above the track level carrying 11,000 volts, and warned his brother not to fool around with it. At this point, it was testified, a spark jumped or arced from the wire to the plaintiff's wrist, inflicting serious and permanent injuries. There were no witnesses to the accident except the minor plaintiff and his little brother.

At the trial, in addition to the above facts, the testimony offered by the plaintiffs, which must be interpreted most favorably to them, disclosed that for several years children had frequently played on the embankment next to the 67th Street bridge, hiding in the hedges, digging holes, and sliding down the concrete sluice. There was also testimony from which the jury could find that children sometimes crossed over the top of box cars standing at this point.[1] The minor plaintiff, although described by his attending physician, a witness on his behalf as a "very brilliant child", testified that he had never heard of a live wire and that he knew nothing about the ability of electricity to arc from such a wire.[2]

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1. The testimony in this regard chiefly relied upon by plaintiffs' counsel was that of two neighborhood witnesses which was in direct contradiction of prior written statements made by them following the accident that they never saw children on the top of or playing around cars stopped in the vicinity.

2. He admitted that his father had told him that electricity was dangerous and that he should never put his hand inside of an electric socket. He also admitted that he knew he should not have been at the place where he was injured because his parents had told him not to go near the railroad tracks; and that he knew "it was a lot safer to go over the bridge".

To establish defendant's liability, the plaintiffs seek to bring the case within the rule set forth in § 339 of the Restatement, Torts. This section of the Restatement supersedes and supplants the doctrine of "attractive nuisance" and the "playground rule": *Thompson et al. v. Reading Company,* 343 Pa. 585, 23 A.2d 729; *McGill et al. v. United States,* 200 F. 2d 873 (C. A. 1952); Prosser on Torts, § 77. It has been termed "The best statement yet made" of the principles under which a possessor of land will be held liable to trespassing children for bodily harm caused by artificial conditions maintained thereon; Prosser on Torts, supra, at p. 620. There can be no doubt that § 339 has been adopted in toto by this Court and is the law in this State; it has been cited, with approval, numerous times[3] by this Court. In *Bartleson et al. v. Glen Alden Coal Company et al.,* 361 Pa. 519, 529, 64 A.2d 846, Mr. Justice Linn said for this Court: ". . . To the extent that past cases are in conflict with the view of section 339 of the *Restatement of the Law of Torts,* which we have adopted, they are no longer authority. . . .". The issue here is whether the evidence presented by the plaintiffs at the trial brings the case within § 339. We think it does not.

Section 339 provides: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor

3. *Thompson et al. v. Reading Company,* 343 Pa. 585; *Prokop et ux. v. Becker et al.,* 345 Pa. 607; *Altenbach et ux. v. Lehigh Valley Railroad Company,* 349 Pa. 272; *Allen, Admr. v. Silverman,* 355 Pa. 471; *Malischewski et al. v. Pennsylvania Railroad Company et al.,* 356 Pa. 554; *Mussolino et ux. v. Coxe Bros. & Company, Inc.,* 357 Pa. 10; *Patterson et al. v. Palley Manufacturing Company (et al.),* 360 Pa. 259; *Bartleson et al. v. Glen Alden Coal Company et al.,* 361 Pa. 519; *Bruce et al. v. Pittsburgh Housing Authority,* 365 Pa. 571; *Gallagher v. Frederick,* 366 Pa. 450; *McGuire v. Carey,* 366 Pa. 627; *Verrichia v. Society Di M. S. Del Lazio,* 366 Pa. 629; *Jennings v. Glen Alden Coal Company,* 369 Pa. 532; *Rush v. Plains Township,* 371 Pa. 117; *Scibelli v. Pennsylvania Railroad Company,* 379 Pa. 282.

knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.". The Restatement thus lays down four requirements, all of which must be met before a possessor of land is liable for injuries to trespassing children: *Verrichia v. Society Di M. S. Del Lazio,* 366 Pa. 629, 79 A. 2d 237; *Jennings v. Glen Alden Coal Company,* 369 Pa. 532, 87 A. 2d 206.

There was evidence in the present case, sufficient perhaps,[4] to go to the jury, to meet the conditions of clauses (a), (b) and (c) of § 339. But the evidence intended to satisfy the condition of clause (d) was not such as to make this element also a jury question.

The comment in § 339 makes this explanation of clause (d): "In determining whether a particular condition maintained by a possessor upon land which he knows to be subject to the trespasses of children involves an unreasonable risk to them, the comparison of the recognizable risk to the children, with the utility to the possessor of maintaining the condition, is of peculiar importance. The public interest in the possessor's free use of his land for his own purposes is of great importance. A particular condition is, therefore, regarded as not involving unreasonable risk to trespassing children unless it involves a grave risk to them which would be obviated *without any serious interference with the possessor's legitimate use of his land.* . .". (Emphasis supplied). In Prosser on Torts,

4. Our consideration of the case has been made difficult because in his zeal the brief of plaintiffs' counsel contains misstatements of fact and unwarranted assumptions.

supra, it is said at p. 624: "The utility to the possessor of maintaining the condition must be slight as compared with the risk to children involved. Here, as elsewhere, negligence is to be determined by weighing the probability and the gravity of the possible harm against the utility of the defendant's conduct. The public interest in the free use of land is such that, in general, he will not be required to take precautions which are so burdensome or expensive as to be unreasonable in the light of the risk, or to make his premises 'child-proof.' Such things as standing freight cars and moving vehicles are undeniably attractive to children, but are socially useful and very difficult to safeguard, and so may call for very little in the way of care. . .".

This Court has consistently maintained a strict insistence on keeping the application of § 339, Restatement, Torts, within proper bounds. In all of the cases where recovery has been allowed, we have stressed the necessity of proving that the danger could be eliminated at moderate cost and effort on the part of the defendant. In every one of these cases, the hazard which caused injury to the child was confined to a small fixed location and could have been eliminated with little effort. In *Thompson et al. v. Reading Company, supra,* where an 8-year old boy was injured on a railroad turntable, the accident could have been prevented by a simple locking device which was on the turntable but had been broken for a long time. We pointed out, at p. 600, that: ". . . The expense and attention required in so locking such instrumentalities are negligible. . . .". In *Altenbach et ux. v. Lehigh Valley Railroad Company,* 349 Pa. 272, 37 A. 2d 429, we allowed recovery where a 3-year old boy drowned in defendant's small reservoir. The defendant had allowed its fence around the reservoir to become in a state of disrepair with several boards missing, and we held the defendant liable since the dangerous condition could be eliminated by a little attention and a slight outlay of money. *Id.* at p. 275. In *Allen, Admr. v. Silver-*

man, 355 Pa. 471, 50 A. 2d 275, where recovery was allowed when a 400-pound metal cylinder, which had been left standing unblocked, rolled off a sloping platform and killed a 5-year old child, we said at p. 475: ". . . It is obvious that for but a very slight cost blocks could have been securely fastened to the platform or the cylinder could have been stored in a place not dangerous to children . . .". In *Patterson et al. v. Palley Manufacturing Company (et al.),* 360 Pa. 259, 61 A. 2d 861, where a 13-year old boy was injured when the wall of a partially demolished building fell upon him, we held that the defendant could have placed a guard on the demolition site for the one additional night during which the wall was permitted to stand, or could have torn it down immediately rather than allowing it to stand until the next morning. The cost of such precautions in the course of a four-day demolition job was obviously inconsequential. In *Bartleson et al. v. Glen Alden Coal Company et al., supra,* on which plaintiffs principally rely, we allowed recovery where an 11-year old boy climbed upon a stationary tower and came in contact with a high tension wire. The tower was enclosed by a fence 7 feet high, the gate of which was unlocked, and we said at p. 527: ". . . The installation of a locking device, at negligible cost, would have obviated the risks to children. . . .".

Plaintiffs' counsel has not cited any case that goes as far as he would now have us go in requiring a possessor who is legitimately using his land for a socially desirable purpose, to take burdensome precautions so as to eliminate the risk of injury to trespassing children. He admits that the 67th Street bridge was properly constructed so that it was impossible to gain access to the electric wires running over the tracks from the street level of the bridge. It is also not contended that the uninsulated wires, necessary for the electrical operation of defendant's trains, could or should have been insulated. Plaintiffs maintain that the defendant was under a duty to fence in the right-of-way at

the 67th Street bridge, or else to see that the electric company's fence was maintained in good condition. However, it is so well settled in this State as to admit of no argument, that it is not obligatory on the part of the railroad to fence its right-of-way to prevent trespassing by children: *Malischewski et al. v. Pennsylvania Railroad Company et al.*, 356 Pa. 554, 52 A. 2d 215; and cases cited therein. In addition it should be noted that on the north side of the tracks between 67th Street and 66th Street, practically the entire block gave easy access to the railroad and of course this would also have to be fenced to prevent children from playing in the area. Moreover the plaintiffs' evidence in the instant case amply shows not only that children played at the base of the 67th Street bridge, but also that they played in many other areas along this right-of-way. One of plaintiffs' witnesses, a Mr. Brower who was a former locomotive engineer for the Pennsylvania Railroad, testified that he had often seen children playing beside the right-of-way and on the railroad cars all along his entire run which was from New York to Washington and return, and in the Philadelphia area he specifically mentioned 39th, 49th, 50th, 59th, 67th, 71st and 72nd Streets in Philadelphia.[5] Within a 30-mile radius of Philadelphia, the defendant has 275 miles of electrified main tracks. Although the plaintiffs are interested only in the railroad right-of-way at 67th Street, if the present argument should prevail, it would apply to any spot along the tracks at

5. To momentarily digress—in support of the requirements of clause (b) of § 339, this witness also testified that defendant had issued special instructions for engineers to blow a whistle at 49th Street, 59th Street and 67th Street because of children playing around these areas. His testimony as to the issuance of such instructions was contradicted by plaintiffs' own witness, George Bottomly, a Rules Examiner of the railroad, and also by overwhelming testimony adduced by the defendant. For the same purpose, plaintiffs' counsel in an attempt to impeach his own witness (without any plea of surprise and over counsel's objection) referred to 4 prior electrical accidents occuring at 49th Street, 54th Street, 65th Street and between 66th and 67th Street.

which children frequently played. What the plaintiffs are saying is that in any area along the railroad property which children frequent, the defendant must make it impossible to reach its tracks either by the erection of child-proof fences of its own or by making certain that the fences of others are sufficient and maintained in good condition. Clause (d) of § 339 imposes liability where the owner of the premises, the other conditions being present, could eliminate the dangerous condition at no great expense and with little interference with the use of the land. It is, of course, obvious that if there were imposed upon the defendant the requirement of fencing the place where this accident occurred, it would likewise be subject to the duty of fencing the innumerable places along its many miles of tracks frequented by trespassing children, to prevent them from clambering over cars of a train halted in transit. The same is true of plaintiffs' claim that the defendant should patrol up and down the length of a train, temporarily halted at an unpredictable point, to protect against children who might happen to climb upon one of its cars. Railroad passenger and freight trains are frequently quite long and they would have to be manned by a score of employes simply to patrol the train while it was thus temporarily standing. Patently the ordinary train crew, aside from their duties in connection with the train's operation, could not effectively perform such function. It would be hopelessly impracticable to employ sufficient guards to police every car on a train which the safety of railroad operations required to be stopped in transit.

The protective measures suggested by the plaintiffs, if adopted, would inordinately burden the operation of the railroad, and consequently have been rejected by this Court in the past. In *Tiers v. Pennsylvania Railroad Co.*, 292 Pa. 522, 531, 141 A. 487, we said: ". . . If it were bound to keep constant guard against the possible presence of others, wherever it was customary for trespassers or licensees to enter upon its right of way, a proper operation

of trains for the convenience of the public would be rendered most difficult, if not impracticable. . . .". In *Shaw v. Pennsylvania Railroad Company,* 374 Pa. 8, 96 A. 2d 923, where a 12-year old boy was injured while climbing over a flat car that was part of a standing train temporarily stopped across a permissive way, we held that there was no duty on the part of the railroad company to place lookouts at the permissive crossing to prevent children from climbing upon the cars. In *Scibelli v. Pennsylvania Railroad Company,* 379 Pa. 282, 108 A. 2d 348, a 7-year old boy was injured while attempting to board a freight train which stopped momentarily in an area of land frequented by children. In rejecting the plaintiffs' contention that the railroad should have posted guards to prevent children from boarding the train, we said at p. 289: "Needless to say, the operation of its trains by a railroad company over its right-of-way for the transportation of freight is an essential function. It is vital to commerce, and the public as well as the railroad company has an interest therein. The maintenance of service should not be made unduly burdensome. We have been referred to no case where a court has gone so far as to require a railroad company to patrol its tracks or police its trains with a sufficient number of guards to prevent children from attempting to board them. On the contrary, other jurisdictions have held that no such duty exists: See Smith v. Illinois Cent. R. Co., 214 Miss. 293, 313, 58 So. 2d 812, 819 (1952); Union Ry. Co. v. Williams, 6 Cir., 187 F. 2d 489, 493 (1951); Nolley v. Chicago, M., St. P. & P. R. Co., 8 Cir., 183 F. 2d 566, 569, 570 (1950); Angiline v. Norfolk & W. Ry Co. et al., 99 W. Va. 85, 128 S. E. 275, 277 (1925); Wilson v. Atchison, T. & S. F. Ry. Co., 66 Kan. 183, 186, 71 P. 282 (1903); The Oregon Ry. and Nav. Co. v. Egley, 2 Wash. 409, 26 P. 973 (1891). It is difficult to conceive how a proper operation of trains for the service of the public could be maintained if the standard of responsibility contended for received countenance.". Referring to § 339(d), Restatement, Torts,

we held at p. 290 that ". . . the impracticable and burdensome task of exercising police supervision over its trains would be out of proportion to the risk to minor trespassers involved. . . ."

We are of the opinion that to allow recovery under § 339(d) of the Restatement in the instant case would extend that rule far beyond its reasonable and intended limits. It would impose upon railroads a heavier burden than they can justly be expected to bear. Children, and especially those responsible for their paternal protection, must be held accountable for their actions where such actions conflict with the dominant public interest in preserving to the possessor the legitimate and necessary use of his land: *Powell et al v. Ligon et al.*, 334 Pa. 250, 255, 5 A. 2d 373; Eldredge, Tort Liability to Trespassers, 12 Temple Law Quarterly, 32, 50. However much we may sympathize with the minor plaintiff and his parents on account of the unfortunate injuries he sustained, we think the record fails to show negligence on the part of the railroad company or its employees.

The judgment is reversed and here entered for the defendant.

Mr. Justice Musmanno files a dissenting opinion.

DISSENTING OPINION OF MUSMANNO, J., OF THE SUPREME COURT OF PENNSYLVANIA.

FILED: November 12, 1956

MUSMANNO, *J.*

On the afternoon of January 10, 1953, a Saturday, a day which has always been one of play for children and is increasingly becoming so for adults, Daniel Dugan and his brother Harry, 11 and 8 years of age respectively, romped and played games in a patch of hedges and underbrush adjoining the tracks of the Pennsylvania Railroad near the abutment of an overhead bridge at 67th Street in Philadelphia. In this area boys had dug caves and tunnels and, in the spirit of imaginative adventure, which makes childhood an infinity of delight, they had named the place "The Jungle." Here they played the usual boyhood games of "hide-and-seek" and "cowboys," adding in the exhilaration of phantasy, another one which they called "explorers." A concrete sluice, built to drain off water from the bridge abutment, and sloping down the embankment to the railroad tracks, served the young explorers as a toboggan slide which carried them to the very edge of the railroad right-of-way which was occupied by four tracks.

While the two Dugan boys reveled and made merry in the "Jungle", a long freight train of 61 cars came up and stopped on the second track. Several box cars with side ladders halted close to the foot of the sluice, down which the youthful adventurers cavorted in their carnival of fun. Five steps away from the end of this exciting journey the box cars, with their welcoming ladders, beckoned to fresh adventure. The boys had earlier decided that they would complete the afternoon's enjoyment by witnessing a film or two at a movie theatre on the other side of the tracks.

Clearing with eager stride the distance from the sluice to the bottom of the box car, Daniel clambered to the roof of the car and viewed the surrounding world at his feet.

Only a few feet above his head a high tension electric catenary wire, which supplied current for electric locomotives, stretched its course. As his brother Harry prepared to follow up the ladder, Daniel called out, warning him that when he got to the top of the car, he was not to "fool around the wires." With this admonition Daniel pointed to the wire to make his point clear. Suddenly the jolting force of 11,000 volts arcked through the atmosphere and struck Daniel, toppling him to the ground. Although no part of Daniel's body had actually come into contact with the wire, the burns inflicted were of such a character that he lost an arm and suffered other serious injuries. The parents, suing in the boy's name and in their own right, initiated a trespass action against the Pennsylvania Railroad which resulted in a verdict of $40,000 for the boy, and $10,000 for them. The Railroad Company moved for judgment n.o.v., which was refused and this appeal followed.

The majority of this Court has reversed the verdicts and entered judgment in favor of the railroad company. I regard this action as unjustified by the evidence in the case, by the law which controls that evidence, and by Section 339 of the Restatement, Torts, which the Majority cites as authority but misinterprets.

The fact that children played in the "Jungle" and crossed the railroad tracks at that point was common knowledge in the community and well known to the railroad company. Carmen Castellano, who lived in the neighborhood, testified:

"Q. Can you tell us, please, what you know about the habit or practice of children playing in the vicinity of that bridge, on the east side of the bridge, on the east side of 67th Street?

A. All I can say after the time the children are out of school they are over there playing.

Q. Is it something that just happens once in a while or is it something that happens regularly and frequently as long as it is clear weather and school is out?

A. Any time children are out of school you can see them playing there.
Q. Do they also play on the west side of the overhead bridge?
A. Play on both, sir. Sometimes they take a short-cut over the Pennsylvania.
Q. How often have you seen them down there?
A. Many times. I have had to call the police several times, city police and *railroad police.*

. . .

Q. What do they [do] when they go down on there?
A. Take a short cut, cross over, climb over cars, crawl over the bank."

Mrs. June Peck, who also lived in the vicinity, testified:

"Q. How long have you lived there?
A. Five years.
Q. And in the course of the time that you have lived there have you seen children playing around anywhere near the right-of-way or the railroad itself?
A. Yes, I have.
Q. And how often have you seen children down there playing?
A. Almost every day."

. . .

"Q. Have you seen children playing around on these cars?
A. Yes, I have.
Q. Have you seen them climbing over cars?
A. I have, yes.
Q. Have you chased children off these cars?
A. Yes, I have."

Harry Dugan, the minor plaintiff's brother, testified:

"Q. And have you seen children try to get across when the train was there?
A. Yes.
Q. How did they get over?

A. They would go over, crawling under or over or either they would go over the top of them.
Over the top of the train.
Q. Over the top of the train itself?
A. Yes.
Q. How did they get up?
A. There was a ladder there.
Q. Have you seen them do that often?
A. Yes sir."

Not only was the railroad police, as indicated in Castellano's testimony, aware of conditions on the railroad in the 67th Street area, but the company itself took official cognizance of the situation. Harry W. Brower, who had been an engineer for the company for 47 years testified that the railroad posted bulletins at the roundhouses instructing locomotive engineers that when they approached 49th, 59th, and 67th Streets they were to blow their engine whistles "hard," because of "so many children playing." He also testified that during the many years that he took his train by 67th Street he often saw children there:

"Q. What did you see children do with respect to these trains standing there?
A. I seen them crawl underneath.
Q. Have you ever seen them go over top of them?
A. Over the top sometimes, yes.
Q. Can you tell us whether or not certain things happened during these years which led to the promulgation of these special instructions that was a matter of known reputation around the railroad?
A. Well I suppose on account of children getting hurt was the reason they put them out, as far as we thought.

. . .

"Q. How many times have you seen children actually on cars in this 67th Street area?
A. Oh, a lot of times.

Q. Tell us when?
A. Well whenever I would be on them freight jobs and would go down there in the summertime you can see them quite often. Every day.
Q. Every day?
A. If you were down there every day I mean.
A. Every day that I was down there."

When a railroad for years allows children to use and occupy its tracks and immediate vicinity, it cannot treat them as trespassers and it must accord them a care which must be something more than token. This Court said in the case of Gawronski v. McAdoo, 266 Pa. 449, 454:

> "We have repeatedly held that, where a railroad company permits its yards or tracks to be used as a playground for children, the corporation is required to operate its rolling stock with due care to avoid injuring such children, and that the ordinary rule, as to the limited measure of duty owing to trespassers, is inapplicable. We have held likewise that one fixed with a duty to regard the safety of children is obliged reasonably to anticipate they will do the *ordinary and natural things* which may be looked for from them under the circumstances." *

What are the ordinary and natural things to be expected of children? The obvious answer is that they will act like children. The playful instincts of boys of tender age are as much a part of the demonstrated forces of nature as the snows of January, the winds of March, and the roses of June. To speak, in this afternoon of the universe, of these elementary and fundamental concepts, which were already accepted fact in the dawn of creation, would be sheer superfluity. And yet it would seem that this truism can at times be overlooked by sages of the law who would attribute to infants the reflection of graybeards, while at

* Italics throughout, mine.

the same time excusing the neglect of adults who act with the irresponsibility of children.

Justice Oliver Wendell Holmes has spoken on this subject in his familiar epigrammatic style:

> ". . . While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult." (United Zinc Co. v. Britt, 258 U. S. 268, 275.)

In the Gawronski case, from which we have already quoted, an eight-year old boy had been standing on a freight car in a railroad yard which, for a long time, in conjunction with other contiguous railroad property, had been used as a playground when the car was struck by other cars which had been hit by a runaway engine. What we said there should be said here: "It becomes clear the case was for the jury—to say whether or not the railroad acted with due care toward these little ones."

In the case of O'Leary v. P. & L. E. R. R. Co., 284 Pa. 4, the lower Court entered a non-suit where a child was killed by a railroad car passing through an area which for years had been used as a playground for children. In removing the non-suit, this Court said:

> "The uncontroverted testimony in the case shows that this is a populous community where there are a great many children who have for many years used the ground adjacent to the railroad tracks as a playground, and had the testimony which was offered been admitted, it would have appeared that the playground, used for so many years by the children, included the part of the defendant's ground where the child lost its life . . . In moving its trains on the tracks, the defendant, therefore, did so with the knowledge that the children of the

neighborhood had been for many years using the ground as a playground, and was required to anticipate that they would continue to do so. This imposed upon the company the duty of reasonable care in the operation of its trains over the tracks so as to avoid injury to those who might be making a permissive use of them. If the jury found that the defendant failed to exercise such care in the operation of its trains on the day of the accident which resulted in the death of John O'Leary it would be negligence which would impose liability."

The defendant railroad company here not only owns the right-of-way with the four tracks, but it is the proprietor of the 67th Street Bridge, as well as the sluice and the embankment with the tunnels and caves. Thus, the situation in this case is not much different from that which obtained in the O'Leary case just cited.

The railroad company attempted at the trial to deny that its embankment had been used by children as a playground, but its effort in this direction was something less than a triumph. Called by the railroad company as a witness, the principal of the high school on 67th Street testified that he never saw children playing on the embankment or on the railroad tracks but in cross-examination he said that the windows of his office did not overlook the embankment or tracks, and thus he could not know what happened there.

A police officer Reid summoned by the defendant testified that he never saw children on the bank or on the railroad track, but in cross-examination he admitted that because of his numerous duties which took him into areas far beyond the 67th Street Bridge he was not in a position to tell what happened there.

On the lot next to the high school the Pennsylvania Electric Corporation maintains a high tension electric wire tower which is surrounded by a wire fence with a gate, punc-

tured by a large hole. It was through this hole that the plaintiff passed in getting down to the embankment and the railroad tracks. The defendant thus sought to make of the plaintiff a trespasser, but Police Officer Boyle, called by the defendant, testified that the gate, with the hole, was open most of the time (9 out of 10 times he saw it), so that the minor plaintiff could have gotten to the railroad tracks without passing through the hole in the fence.

That the railroad company was aware that the train involved in the Dugan accident often stopped in the vicinity of the Jungle is acknowledged in the Majority Opinion, which relates that during the month preceding the accident, the train in question had been delayed at the Jungle for periods varying from 8 to 59 minutes. The railroad was thus charged with the knowledge that boys might climb over the halted cars as they had been doing for years in the past. Why did the railroad company not do something to prevent this dangerous practice? Daniel Dugan was not the first person injured by the catenary wires in this vicinity. Sergeant Elijah L. Hammond of the Railroad Police testified that he knew or was informed of three other cases of boys who had sustained serious injuries when, after climbing box cars, they had come into contact with the overhead electric line. This Court has often held that knowledge on the part of a defendant of a danger on his property, which has resulted in injury to others, is a relevant factor to be considered by the jury in determining whether the defendant has exercised due care under the circumstances. In Muller v. Kirschbaum Co., 298 Pa. 560, the trial Court admitted the introduction of evidence to the effect that on three occasions within the preceding five years an accident similar to the one in litigation had occurred. This Court approved the ruling which permitted the evidence.

> "Knowledge of injury is imparted by information of like occurrences under similar circumstances, and is a

fact to be considered by the jury in determining whether proper precautions were taken."

Is it unreasonable to say that the railroad should have foreseen that children might climb box cars which stopped at the Jungle? It knew that boys had been mounting box cars; it knew of the catenary wire. Was it too much to expect that in ascending to the top of the cars, boys might come within range of the deadly current overhead? If the railroad had placed ladders under the wires would it be an unwarranted assumption that eager and spirited boys would climb the ladders? In the case of Bartleson v. Glen Alden Coal Co., 361 Pa. 519, a boy of the same age as Daniel Dugan (11 years plus) climbed a 45-foot tower for no other reason than the thrill of scaling the heights. At the height of 15 feet he was hit by the shock of a 4000-volt wire. In order to get to the tower young Ross Bartleson had to enter into a fenced enclosure 7 feet high, the gate of which had been left open. In the suit for damages against the owner of the land, the defendant argued that the dangerous wire was not on the ground and thus not within the foreseeable orbit of danger. This Court said, however:

> "There is no rule which requires that the dangerous condition must be on the ground or within reach of a minor. Such a distinction is artificial, without logic or experience to support it. What this distinction really drives at is the question of whether or not a defendant shall be held reasonable to anticipate that a child will bring himself within the orbit of the danger. . . . The act of climbing was not unusual, on previous days other boys had done precisely the same thing. The tower was equipped with pegs or studs intended to facilitate climbing. These pegs were accessible from the ground. It is strange that defendant would argue that he could not anticipate the use of these pegs for precisely the purpose for which they were put there."

If it was not unusual for Ross Bartleson to climb the pegs in the Glen Alden tower, with what less unusuality must we regard Daniel Dugan's climbing of the box car ladder?

> "That children will accept a situational invitation to climb is a matter of common knowledge. . . The jury found that plaintiff did not realize or at best imperfectly realized his exposure to danger. The tower was not so obviously dangerous that the child must be deemed to perceive the risk involved as though he were an adult." (Bartleson, supra, p. 529).

If the soaring tower in the Bartleson case was not obviously dangerous to Ross Bartleson, certainly so substantial an object as a box car would be even less obviously dangerous to Daniel Dugan.

The Majority Opinion makes the sardonic remark that although Daniel Dugan had been described as a "very brilliant child" he had never heard of a live wire, and "knew nothing about the ability of electricity to arc from such a wire." In this connection it may be noted that even men working for the railroad are not familiar with all the phenomena which accompany the motive power of so vast an operation. Matthew A. Duffy, Inspector of Electric Transmission for the Pennsylvania Railroad, testified that it was necessary for him to teach his own men about the "arcking" propensities of tension wires. But this case does not turn on whether Daniel Dugan knew or did not know about the arcking of live wires. The case would have been no different if he had touched the wire, as did young Ross in the Bartleson case.

The question in the Bartleson case, as it is the one in the case before us, was: What duty does the owner of land accommodating a dangerous device owe to minor trespassers? We answered that question in *Bartleson* by saying:

"The defendant knew or should have known that children were likely to trespass upon its land. For years without objective disapproval children had played games within 20 to 400 feet of the tower; for years adults and children alike had used pathways carrying them past and within a few feet of the tower. In view of the overwhelming character of the testimony the jury could reasonably infer that the defendant coal company, through its agents, actually knew that children played in the vicinity of its tower. 'Toleration of trespass for sufficient time gives rise to privilege which adds to the duties of the occupier in the maintenance and use of his premises.' "

In the case at bar the railroad knew that children played in the Jungle adjoining the tracks, knew that they played on the tracks, that they climbed box cars, that they crossed the tracks. Did the railroad take the precautions that the situation obviously demanded in order to avoid accident and tragedy? Did the railroad show toward Daniel Dugan the care to which, under the law of this Commonwealth, he was entitled? The jury answered those questions in the negative. Why does this Court negative the findings of the jury?

In the case of Costanza v. Pittsburgh Coal Co., 276 Pa. 90, Francesco Costanza, 6 years of age, was killed when he came into contact with an electric transformer located in an open lot frequently used as a playground by children of the neighborhood. Twenty feet from the enclosure containing the transformer stood an old wagon which was a source of attraction to children. The lower Court entered a nonsuit saying that since the deceased child had been a trespasser the defendant owed him no duty except to refrain from wilfully or wantonly inflicting injury. We reversed:

"In view of the use of the ground surrounding the enclosure as a playground, defendant was bound to

recognize the fact that children in their play might heedlessly act in a way tending to result in personal injury and that childish curiosity in all probability might lead them to investigate the nature of the mechanism within the enclosure and under such circumstances there was imposed upon defendant the duty to anticipate and guard against such acts. It does not help defendant to say the main attraction on the lot was not the transformer but the old wagon standing near by. The latter was separated from the enclosure by a distance of but fifteen or twenty feet. If children played about the wagon it is but natural they would also, in the course of their play, pass around or into the small building and enclosure and probably climb upon, through or over the fence, whichever their fancy should dictate. Accordingly, it was defendant's duty, having knowledge that children were in the habit of playing in the vacant lot, and especially in view of the dangerous character of a high voltage electric current, to eliminate, as far as reasonably possible, all sources of danger."

Section 339 of the Restatement, Torts, provides that a possessor of land is liable for damages to an injured minor plaintiff if (1) he knows that children may trespass on his land; (2) if he has on his land a dangerous instrumentality which may involve an unreasonable risk to children; (3) if children do not realize risk; and (4) if the utility to himself of "maintaining the condition is slight as compared to the risk to young children involved therein."

The Majority admits, rather begrudgingly I think, that the plaintiff has made out a case under the first three requirements of Section 339 but asserts he has failed under the fourth. The Majority says that the railroad company cannot be required to take precautions which are burdensome or so expensive as to be unreasonable. The evidence in the transcript of the record shows that the accident of

which Daniel Dugan was the victim could have been avoided without the railroad company taking burdensome precautions or undergoing exorbitant expense. The freight train involved in the accident carried a crew of five men—engineer, fireman, head brakeman, conductor, and rear brakeman. During the 44-minutes delay on January 10, 1953, the crew had no duty to perform which would have precluded their overseeing conditions at 67th Street. They knew or should have known that children played there, they knew or should have known that children might mount the box car with their alluring ladders, and of course they knew of the high tension wires.

The railroad company maintains a police rail car with two-way radio equipment. When the tower operator in that area learned where the train was stopping, he had only to radio this information to the police car, and the 67th Street Bridge region would have been guarded. Sergeant Hammond testified that this was normal procedure:

"Q. If the children are playing in any given vicinity and that is a fact that is known to you, and a train stops in that vicinity, and you are informed that the train was stopped there, what would you do insofar as protecting the train and so far——

A. If I was in that vicinity I naturally would try to get them off the cars.

Q. And if the man at Brill either contacted you directly or contacted you whichever way he gets you, over that wireless, informed you that the train was stopped there in the vicinity where children were playing what would you do insofar as protecting them?

A. Proceed to that place to get them off any railroad property as fast I could.

Q. Would that be because you were afraid these children might climb on this car?

A. Possibly would get on, yes, sir."

However, this established procedure was not followed in the present instance. Was this not negligence? At any rate, was it not for the jury to decide whether or not the railroad's omission constituted negligence?

Clause (d) of Section 339 of the Restatement does not say what the Majority seeks to have the reader believe it says. I repeat the condition which fastens liability: "The utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." What this clause obviously declares is that a possessor of land will be liable for injuries sustained by children trespassers if the usefulness of the dangerous device or operation is of little consequence as compared to the risk to which the children trespassers are subjected. The clause makes no mention of expense. Of course, the "condition," which is the subject of controversy here is not the movement of the train, which naturally is of great consequence. The "condition" is the stoppage of the train *without* taking measures to keep the children off it. Obviously the fact of not warning the children has no utilitarian value to the railroad company at all. It isn't as if the train could not run if the children were not warned to stay off. The train could run with or without this being done. Thus the utility to the railroad is not only "slight", but practically non-existent.

From the question as to whether the "conditon" is of slight or great importance has arisen the idea of slight or great expense. Thus, in the Comment on clause (d), a reference is made to dangerous farm machinery and then appears the comment:

> ". . . if the installation of devices which would prevent the machine being set in motion were practicable without burdensome cost or serious interference with the utility of the machine, it might be unreasonable

for a farmer to keep the machine without such equipment in a place notoriously open to trespassing children."

It will be seen in this illustration that although the phrase "burdensome cost" is used, it is equated with "serious interference with the utility of the machine." In order for the landlord to be immune from responsibility, it must be shown that the elimination of the dangerous condition he maintains would seriously interfere with his business. But I repeat—keeping children off the box cars as 67th Street would in no way interfere (much less seriously interfere) with the operation of the railroad. Illustration 5 under Section 339 further emphasizes this point:

"Under the circumstances stated in Illustration 4, the A Railroad Company would not be liable to B injured while playing upon its turntable, if a locking device capable of preventing children from setting the turntable in motion would have prevented its effective operation and if to surround it with a reasonably child-proof fence *would have seriously interfered with the operation of the railroad.*"

Without interfering in any way with the operation of the railroad the defendant could have built a fence separating the Jungle from the railroad tracks. This would have assured keeping the children off the tracks and the expense involved would have been negligible.

The Majority, however, in discussing this phase of the case refuses to restrict the locus in quo to 67th Street where the accident occurred and where the Jungle was located, but speaks of fencing in vast distances and immeasurable areas over the 275 miles of electrified main tracks! There is no argument in logic so wearisome as that which seeks to prove a point by an irrelevant comparison or one so exaggerated in scope as to make it wholly foreign to the

discussion. It is like equating an ant hill with Mt. Everest because they are both protuberances from the earth's surface, or comparing a flea with an eagle because they both fly, or a monkey with an elephant because they both eat peanuts. It is absurd to say that because the railroad would be required to fence away the Jungle from the tracks, it would be required to fence the whole length of its 275 miles of electrified main tracks or even to fence areas where a child or two has been playing beside the right-of-way or climbing on a car. Liability only arises where there is a known dangerous practice which a railroad company can avoid. Thus, it is no answer to say that if the railroad would be required to erect a fence some 20 or 30 feet long, at a cost of some one or two hundred dollars, it would be called upon to build a fence 275 miles long.

> The Majority Opinion makes the statement:
> "However, it is so well settled in this State as to admit of no argument, that it is not obligatory on the part of the railroad to fence its right-of-way to prevent trespassing by children: Malischewski et al. v. Pennsylvania Railroad Co., et al., 356 Pa. 56 A. 2d 215; and cases cited therein."

This matter may seem "well settled" for the Majority, but the Malischewski case cited in support of the Majority's sweeping assertion does not support it at all. In that case, which had to do with a railroad station, and not a playground, Judge Finletter of the Philadelphia Court of Common Pleas, whose Opinion was adopted by this Court, said:

> "With regard to the fencing of the right of way, it is established by the cases that it is not obligatory on the part of the railrod to fence its right of way."

No one, with any appreciation of responsibility, has ever claimed that a railroad, especially a long one like the Pennsylvania Railroad, should be required to fence its *entire* right of way.

It occasionally happens that an attorney will cite in his brief a number of cases in alleged support of a given position, but which upon examination turn out not only not to uphold the asserted position but sometime actually are irrelevant to the point under discussion. The vexation which accompanies such a revelation is not lessened if the citer happens to be a Court instead of an attorney. The Majority Opinion has offered, in substantiation of its above-quoted statement, the Malischewski case "and cases cited therein." There are five cases cited. I have examined those cases and not one makes the assertion so categorically advanced by the Majority, namely, "It is not obligatory on the part of the railroad to fence its right-of-way to prevent trespassing by children." One of the cases [1] makes no reference to a fence or fencing at all. Another of the cases [2] has nothing to do with a railroad right-of-way. The accident there occurred in a *pond of water* on land owned by a railroad company. In a third case,[3] the plaintiff was injured when he tried to rescue a playmate who had fallen on a railroad track. The Court there said: "There was no duty upon defendant to fence and guard its tracks so as to prevent entrance by children," but the Court was referring, *not* to the whole length of the Reading Company tracks. It meant only the particular portion of tracks where the accident occurred. Following the quotation just given, the Court went on to say "The tracks [where the accident occurred] were not easily accessible and afforded no facilities for play, and there was no proof that they were used in such a manner as to presuppose an invitation or permission to occupy them as a playground or permissive way." In the fourth case [4] it was established that a certain portion of a railroad was not a permissive passageway and therefore there was no obligation on the

1. Wright v. P. R. R., 314 Pa. 222.
2. Murdock v. P. R. R., 150 Pa. Superior Ct. 156.
3. Tedesco v. Reading, 147 Pa. Superior Ct. 300.
4. Noonan v. Pa. Railroad Co., 128 Pa. Superior Ct. 497.

part of the railroad to fence *it* in. In the fifth case[1] the plaintiff was hurt when in searching for a lost baseball on the edge of a hill, the path beneath his feet (because of rain) caved in and he fell over an embankment down to railroad tracks beneath. The Court there said there was no obligation on the part of the railroad to "shore up the cut or to fence it in."

In not one of these cases, nor in any case that has come to my attention, has the statement ever been made or even distantly suggested that there could never be a situation where a railroad would be required to fence a *part* of its right-of-way to prevent injury to children. Indeed it would be monstrous for a Court to render such a decision. To say, for instance, that a railroad company, whose tracks went by a school for deaf or blind children, would not be required to fence its right-of-way at that point would be to make an utterance that no Court in the land worthy of the name would countenance.

In further attempted support of its position that the railroad is under no obligation to take steps to prevent children from being injured or killed on its right-of-way, the Majority mentions *Scibelli v. Pennsylvania Railroad Company*, 379 Pa. 282. In citing this case the Majority apparently proceeds on the assumption that a decision badly made acquires virtue and authority with the passage of time and by subsequent citation. In the Scibelli case it was established that children had used the railroad right-of-way as a playground for eighteen years. On the day of the accident a train with a crew of five men stopped within the playground known as "The Willows." Not one of the crew descended from the train to warn children not to board the train although the crew knew, or should have known, that for eighteen years children had been doing this. The minor plaintiff, seven-year-old Frank Scibelli boarded one of the cars and when it perked he was thrown

1. DiMarco v. Penna. R. R. Co., 321 Pa. 568.

under the wheels, losing a leg. It was the contention of the plaintiff that the accident would have been avoided if one of the crew or anyone representing the railroad had exercised supervisory protection around the train when it stopped within the playground. The Majority of this Court, using the same type of reasoning that it is employing in this case, said that there was no duty on the part of the railroad "to patrol its tracks or police its trains with a sufficient number of guards to prevent children from attempting to board them." Here again we have that sophistry in argument which makes of a limited proposition an assertion of universal application. The playground in the Scibelli case was only one block long,—375 feet. But answering the plaintiff's position that the railroad should patrol the fragmentary distance of 375 feet for a matter of minutes, perhaps only seconds—when the train momentarily stopped in the playground—this Court answered that there was no obligation on the part of the railroad to patrol the whole length of the railroad and to have police guards on every train!

This is not the place for a reargument in the Scibelli case. I gave my views on the matter at the time the Majority Opinion was filed, but I would not want the mere citation of the Scibelli judgment to be interpreted (insofar as I can voice objection to it) as one worthy of being regarded as a precedent. I regard the injustice of the Scibelli decision as one of the dark pages in the history of the development of the rights of children and I believe that some day this Court will repudiate it. However, until that day comes I can only look upon it with a depressed spirit and an intellectual abhorrence.

In listing railroad cases where children were injured and recovery was allowed in the past, the Majority Opinion says:

> "In all of the cases where recovery has been allowed, we have stressed the necessity of proving that the

danger could be eliminated at moderate cost and effort on the part of the defendant."

While it happened in those cases, as indeed it would be true it this case, that the monetary expenditure required to remedy the dangerous situation was a small one, I cannot accept that where life and limb are endangered, money should be an obstacle to safety. Progress would be a melancholy phenomenon if it were to be made at the expense of the well-being of children. While it is important that railroads run, it is more important that they run to serve mankind. Of course, railroads cannot be mulcted in damages without law. No railroad could possibly exist if it were enough merely to charge it with negligence in order to require it to disburse large sums of money. On the other hand, it cannot be successfully argued that because railroads supply an indispensable service to civilization's needs, they are immune from the laws of liability which govern every other type of commercial vetnure.

The argument that the railroad's exchequer takes precedence over the value of human life runs counter to everything that has been advocated and done in America in the way of social and economic progress. In every progressive step of the laws of safety, the protest of those who have opposed has often been the cost for the installation and maintenance of the innovation. But we have seen how safety and greater appreciation of the precious commodity of existence advances, notwithstanding. When a dangerous curve wrecks a train, railroad architects and civil engineers consider at once ways of straightening out the track so as to avoid future wrecks. When a hillside caves in, burying a train and its passengers beneath an avalanche of death and cripping injuries, the mountain is trussed up with bands of steel and fortified with masonry. When a flood washes a train into a swollen river the tracks are raised and future inundations balked. Tunnels are bored through mountain sides, interlocking systems are devel-

oped, bridges are thrown across chasms and ravines, all at huge expenditures of money, and all for safety, all for progress, and eventually for greater profit to the railroads too, because no railroad can hope to become successful if its tracks are strewn with the skeletons and limbs of victims of brutal indifference to humanity.

This observation is introduced not as a pronouncement of philosophy or a plea for humanity in the law. It has been made necessary because of the Majority's assumption that clause (d) under Section 339 of the Restatement, Torts, absolves railroads from responsibility for negligence if it can be shown that it will cost them money to remedy a situation which sounds its own alarm calling for repair. The law of Pennsylvania proclaims in terse and clear terms the theme on which I have just expatiated, perhaps at too great a length. In the case of Hawk v. P. R. R. Co., 307 Pa. 214, this Court, quoting from 20 R.C.L., page 25, sec. 18, said:

> "When human life is at stake, the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done, regardless of difficulties or *expense*."

And we must not lose sight of the fact that while the defendant in this case is a railroad company, the dangerous instrumentality is not a railroad locomotive or train, but something far more devastating in its capacity for destruction—electricity. As this Court said in the case of Sebok v. Pennsylvania Edison Co., 331 Pa. 524, 527:

> "It must be remembered that we are here dealing with one of the most dangerous agencies known to man—electricity."

In Brillhart v. Edison Light & Power Co., 368 Pa. 307, 312, we said:

"A supplier of electric current 'is bound not only to know the extent of the danger, but to use the *very highest degree of care practicable* to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them'."

Did the defendant in this case use the "highest degree of care practicable" in all the circumstances? That was the issue at the trial and it was decided by the jury in favor of the plaintiff. We have no warrant to disturb the verdict of the fact-triers, but since this Court has done that awesome thing, in defiance of principles laid down by this very tribunal in happier decisions, I must, perforce,

Dissent.

PLAINTIFFS-APPELLEES' PETITION FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA.

The petition of DANIEL DUGAN, a Minor, by His Parents and Natural Guardians, Daniel Dugan and Helen Dugan, His Wife; and Daniel Dugan and Helen Dugan, His Wife, in Their Own Rights, by their attorneys, RICHTER, LORD & LEVY, Esquires, respectfully represents:

1. That on November 12, 1956, this Court set aside a jury verdict upon which judgment had been entered in the Court below on behalf of the plaintiffs-appellees.

2. This case involved a determination of tort liability under Section 339 of the Restatement of Torts for injuries sustained by the child plaintiff while trespassing on the premises of the defendant-appellant.

3. This Court decided in its opinion that the issue was properly raised under Section 339 of the Restatement of Torts.

4. This Court upon review of the whole case conceded:

> "There was evidence in the present case, sufficient perhaps, to go to the jury, to meet the conditions of clauses (a), (b) and (c) of § 339. But the evidence intended to satisfy the condition of clause (d) was not such as to make this element also a jury question."

5. This concession means that this child was injured at a point where the owner of the land (Pennsylvania Railroad Company) knew or should have known that children frequently trespassed and were likely to accept the situational invitation to climb upon a car or train should it be stopped in front of the particular place where the playground was located.

6. The finding of the jury necessarily forces an admission that there was a crew already in the caboose attached to this train who knew or should have known, and who were told or should have been told, that at the foot of 67th Street, the point of this accident, there was located a spot where children frequently played and were likely to trespass upon the railroad and onto such cars and trains as might be stopped in front of that spot.

7. As stated above (paragraph 4) the Court conceded that the plaintiffs-appellees had met the requirements of Section 339(a), (b) and (c) sufficient to submit those issues to the jury for determination. Thus the sole question for further determination was whether or not under Section (d) it was too burdensome for the crew inside the caboose or the motorized railroad police to proceed to guard and protect such children as the railroad knew or should have known might well be playing, albeit as trespassers, at the 67th Street spot against the hazard that they might be harmed by climbing upon the cars or trains then and there located which were knowingly stopped by the defendant, its servants, agents or employees.

8. The Seventh and Fourteenth Amendments of the Constitution of the United States and Article I Section 6 of the Constitution of the Commonwealth of Pennsylvania, required this Court to rule upon these clear cut issues and such issues alone. This Court did not rule upon such issues but adjudicated an issue completely foreign to the case and failed to adjudicate the true issue. By violating these Constitutional Commands this Court deprived the plaintiffs-appellees of their right to trial by jury of the true issue which was properly submitted by the Court below and further deprived them of due process which dictates that such issue and such issue alone must receive appellate review.

9. The issue alien to the case adjudicated by this Court was whether the public policy which until now has pro-

tected children such as plaintiff-appellee must yield to the countervailing public policy of the freedom of use of land by its possessors. In so concluding, this Court said in its opinion:

> "Children, and especially those responsible for their parental protection, must be held accountable for their actions where such actions conflict with the dominant public interest in preserving to the possessor the legitimate and necessary use of his land."

In fact this is not the issue in the case. The issue is and was: In the circumstances of this place where children notoriously played and trespassed, did the burden of having brakemen leave their seats in the caboose and walk to guard the scene, or directing railroad police to protect those children, outweigh the risk of the terrible harm to life and limb such as that which occurred here to Daniel Dugan.

10. Had this Court in its opinion said, notwithstanding its reaffirmance in this very opinion on page 5 in its footnote 3 of a long line of cases, many of them recent, that the owner of an artificial condition which he brings upon his land may ignore the presence of child trespassers, then we would have no complaint since this Court may decide to declare such to be the law of this State notwithstanding its previous public declaration of the deep and abiding interest of this Commonwealth in child life. That, this Court did not say. That we know it would not say. What it did say is utterly foreign to and in no way connected with this case and could not be properly made the basis for disposition of this case. *The one true issue in the case still remains to be adjudicated.*

11. It has long been the clear rule that a jury verdict which does not decide the issue in a case cannot support a judgment. *Patterson v. United States,* 2 Wheat. (U. S.) 221, 4 L. Ed. 224:

> "The reason of the rule is obvious, it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issues, or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict."

Constitutional law will be satisfied with no less from an appellate Court.

WHEREFORE, your petitioners respectfully request that this Court recognize that it is Constitutionally bound to decide this case upon the true issue presented below and here and that argument be granted in the light of the Constitutional law questions inescapably created by the opinion of this Court, so that the same may be preserved for appellate review hereafter.

Respectfully submitted,

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Counsel for Petitioners.

BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA.

This brief is submitted in support of plaintiffs-appellees' petition for reargument.

On November 12, 1956, this Court set aside a jury verdict upon which judgment had been entered in the Court below on behalf of the plaintiffs-appellees.

The case at bar involved a determination of tort liability under Section 339 of the Restatement of Torts for injuries sustained by the child plaintiff while trespassing on the premises of the defendant-appellant, and the Court decided in its opinion that the issue was properly raised.

I.

In its opinion the Court acknowledged that the crux of the case turned on Clause (d) of Section 339, as to which it found insufficient evidence to create a jury question.

The opinion molded and adjudicated the issue in the case as being one of whether, under Section (d), public policy, which has until now protected children such as Daniel Dugan, must yield to the countervailing public policy of the freedom of the use of land by its possessors. In so concluding the Court stated at pages 11-12 of its opinion:

> "Children, and especially those responsible for their parental protection, must be held accountable for their actions where such actions conflict with the dominant public interest in preserving to the possessor the legitimate and necessary use of his land."

In fact and in law this is not the issue in the case, and to see in bold relief why it is not, we must turn to two other cases in this Court.

In *Malischewski et al. v. Pennsylvania Railroad Company,* 356 Pa. 554, 52 A. 2d 215 (1947), the minor plaintiff was injured at a regular station of the railroad when he climbed an isolated coal car which was so situated as to be within reach of an energized train power line. The Court found that no permissive playground was involved, but merely a railroad station. Steps built by the railroad supplied access to the station and the platform which, under those circumstances were manifestly necessary for the use of passengers.

In adopting per curiam the opinion of Judge Finletter below, this Court acknowledged the accuracy of Judge Finletter's holding at Pages 556-557 that:

> "With regard to the fencing of the right of way, it is established by the cases that it is not obligatory on the part of the railroad to fence its right of way. NOONAN v. P. R. R., 128 Pa. Superior Ct. 497; DIMARCO v. P. R. R., 321 Pa. 568; MURDOCH v. P. R. R., 150 Pa. Superior Ct. 156; WRIGHT v. P. R. R., 314 Pa. 222; TEDESCO v. READING Co., 147 Pa. Superior Ct. 300."

As appears from the very face of the *Malischewski* opinion that situation is one in which there had to be an issue of the risk of harm to a child as against the industry-wide free use of land by its possessor because isolated railroad cars in those situations can only be neutralized as potentially dangerous instrumentalities by fencing railroad rights of way throughout the entire system. In the case at bar, however, that could not nor should not be the issue because as the record shows trains which stop in the area in question carry with them a built-in, no-expense method for preventing such tragedies as that in suit: the crew of the train. Thus there is no problem of defendant-appellant's having to employ special guards throughout its New York to Washington system to police the track but rather simply of using available men in the delimited area in question. The only issue in the case on this aspect is whether the

burden of using such men under these particular circumstances can be said to outweigh the risk of injury to Daniel Dugan.

This record also shows that the problem of fencing the right of way of the railroad in these circumstances is not one which, like *Malischewski*, raises the spectre of a railroad having to fence all its rights of way throughout a metropolitan area, but solely and simply whether the extremely delimited area in question should have been fenced. This alone is the "particular condition" comprehended by § 339(d). The issue should have been framed and adjudicated in these exact terms. It was not.

The faultlessness of the judicial process in *Bartleson et al. v. Glen Alden Coal Company*, 361 Pa. 519, 64 A. 2d 846 (1949), presents striking contrast to that in the case at bar. In that contrast we see the fatal defect in the instant opinion. In *Bartleson* as here defendant appealed from the discharge of its rule for judgment n.o.v. There, as here, the minor plaintiff sustained serious injuries as a result of an energized electric wire. The *Bartleson* opinion indicates that defendant had erected a high tension transmission tower on its land. The tower supported wires carrying electric power used for general mining purposes. Minor plaintiff climbed this tower, access to which was gained through an unlocked fence gate. This Court held that case to be governed squarely by Section 339 of the Restatement. The precise question with respect to Clause (d) of Section 339 in the *Bartleson* case turned on the installation of a locking device on the tower in question and as to that this Court held at Page 527:

> "The installation of a locking device, at negligible cost, would have obviated the risks to children. *Restatement of Torts*, Section 339, Comment on Clause (d)."

The above quotation is fraught with significance both for the *Bartleson* opinion and for the instant opinion. This

Court in its opinion in the case at bar also referred to the Comment in Section 339 on Clause (d). The Comment provides:

> "In determining whether a particular condition maintained by a possessor upon land which he knows to be subject to the trespasses of children involves an unreasonable risk to them, the comparison of the recognisable risk to the children, with the utility to the possessor of maintaining the condition, is of peculiar importance. The public interest in the possessor's free use of his land for his own purposes is of great importance. A particular condition is, therefore, regarded as not involving unreasonable risk to trespassing children unless it involves a grave risk to them which would be obviated without any serious interference with the possessor's legitimate use of his land."

Observe that the Comment speaks of *the* condition and that condition must, of course, invariably be the condition posing the threat of harm. Lest there be any doubt that the condition anticipated by the Comment is indeed a precise one, the Comment not once but twice speaks of "a particular condition".

The *Bartleson* opinion addressed itself to that problem, namely the "particular condition" involved in that case: a locking device on the tower in question. It did not decide a question involving locking devices on all of the towers on that defendant's property. It did not decide a question involving the number of miles across which those towers were located on defendant's property. It did not decide a question involving the number of unlocked gates on the fences around those towers all across defendant's property. It did not decide a question involving child-proofing those towers all across defendant's property. It did not decide a question involving "innumerable places" along the "many miles" of lines and towers across

defendant's property which were "frequented by trespassing children". In short it did not reach to adjudicate each and every one of those issues in *Bartleson* because they were manifestly alien. It addressed itself to the one real issue in the case and in so doing the Court gave the litigants in that case the adjudication to which they were entitled.

To say these things is to say what the Court here did not do and what plaintiffs-appellees did not get. The Court turned away from the issue of the "particular condition" involved in the case and substituted therefor an issue involving industry-wide ramifications. Rather than decide whether or not there was an inordinate burden upon defendant-appellant to eliminate this particular condition—the only issue in the case—the Court flatly failed to face the issue at all. If it had been resolved, there would have been an end to the litigation. There would have been a genuine adjudication.

What has happened in this case can fairly be caught in the analogy of litigants who, in trial by jury, are contesting whether Washington or Detroit is a more populous city and upon appellate review of that question they are told by the reviewing Court that New York has the greater population, and therefore plaintiff did not create a submissible question on the real issue. In that analogy, as in the case at bar, the original issue still remains unresolved and the right to have that issue tried by jury has been denied in the process.

If a jury verdict had been so rendered, it could not support a judgment. *Patterson v. United States,* 2 Wheat. (U. S.) 221, 4 L. Ed. 224. Certainly the adjudication of an appellate court in these circumstances is equally defective.

It is, of course, within the power of this Court to draw a conclusion as to the burden imposed upon the railroad by the particular condition in question different than the conclusion drawn by the Trial Judge (277a, 278a), but it is also the duty of this Court, as it is the duty of all appellate

courts, to address itself to that question. The Trial Judge did. This Court did not.

We face here a mandate at the very heart of the judicial process: courts may not foreclose issues in litigation by avoiding them. Only as recently as this year the Supreme Court of the United States acknowledged the vitality of this principle in *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U. S. 183, 76 S. Ct. 758 (1956). There respondent railroad appealed from a judgment for petitioner in the United States District Court, alleging (1) there was insufficient evidence to permit submission of the case to the jury and (2) erroneous admission of proof of prior accidents. The Court of Appeals reversed the judgment on the first ground and did not pass on the second. The Supreme Court reversed and reinstated the District Court's judgment. Respondent petitioned for a rehearing and then for recall of the judgment on grounds that the judgment of reversal denied and deprived it of the fundamental right to have the evidentiary question of law decided by the Court of Appeals. Recall of the judgment was granted and the cause remanded to the Court of Appeals "in the interest of fairness" (at Page 184). See also *Union Trust Co. v. Eastern Air Lines, Inc.*, 350 U. S. 962, 76 S. Ct. 429 (1956).

If fairness dictated that *Cahill* be treated as it was, certainly that same kind of fairness would compel the conclusion that this Court must adjudicate the one authentic issue in this case. In fact, the conclusion is more compelling here than in *Cahill* for there it might have been argued (as the minority did) that the evidentiary issue was without merit. That cannot be said as to the genuine issue in this case and this Court did not, and we earnestly believe, would not say it.

The Seventh and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 6 of the Constitution of the Commonwealth of Pennsylvania have been violated in the treatment this case has received in

this Court. The only authentic issue in the case was tried by a jury. Its verdict has been obliterated here through this Court's adjudication of an issue foreign to the case, and its avoidance of the true issue. This is manifestly the destruction of plaintiffs-appellees' right to trial by jury.

Furthermore, in creating and then deciding that false issue, the Court foreclosed plaintiffs-appellees from ever receiving an adjudication of the one real issue in the case. Every litigant is entitled to adjudication of genuine issues, and nothing less than that. To deny that is manifestly to deny due process of law.

II.

We have just concluded arguing that this Court erroneously ruled as a matter of law that the test of 339(d) related to the alleged burdensomeness of fencing the entire right of way of the railroad company. It was our position that that was not the litigated issue or the issue that the Court had to decide under 339(d).

Leaving to one side this inescapable constitutional law dilemma in which the Court must find itself by reason of its conclusion and the rationale in the opinion, we believe that the Court could not reach the conclusion it did reach even were it not proscribed by limitations of constitutional law.

The conclusion reached by the Court of the alleged burdensomeness of fencing in the entire right of way is bottomed upon a factual summary that obviously came through the witnesses Brower and Hooven. The net effect of the Court's analysis of their testimony is that children criss-crossed at any and all points along the right of way over the defendant's territory from New York to Washington. The difficulty with such reliance is that it flies in the face of this Court's very recent restatement of a fundamental principle of law in *Campbell v. Gladden*, 383 Pa. 144, 150, 118 A. 2d 133 (1955). Brower was plaintiffs-appellants' witness. On direct he testified to no such facts. His testimony was limited to a specific, extremely delimited area

around which every one must admit it would have been easy either to erect a fence or protect the spot from trespassing children who at those specific points regularly and notoriously congregated and played. Going beyond the scope of the direct examination on *cross-examination,* counsel for the defendant at pages 185a-186a, 188a, brought out that children occasionally were seen to cross at points additional to the three well known and clear-cut playground areas.

Hooven was defendant's witness. His testimony was also *oral.* The jury could accept it or reject it and by the jury's verdict we must assume that it rejected it. *Hartig v. American Ice Co.,* 290 Pa. 21, 137 A. 867 (1927); *Borough of Nanty-Glo v. Amer. Surety Co.,* 309 Pa. 236, 163 A. 523 (1932). Furthermore as was obvious to this Court in its opinion, the plaintiffs-appellees were entitled to have evidence construed in the light most favorable to them.

What then must we observe about Brower's testimony? This Court said in *Campbell v. Gladden, supra,* at page 150:

> ". . . The Mudano case, however, is clearly distinguishable from the one at bar because there the expert witnesses gave opposite opinions while on direct examination. Here, Dr. Ramsey made no reference in his testimony in chief to causal relationship between the accident and Campbell's death. He was called by the plaintiff to testify only as to the result of the autopsy he had performed on the deceased. *The testimoney with regard to non-tortious causation of death was brought out on cross-examination and went beyond the scope of the direct examination. The plaintiff, therefore, cannot be bound by Dr. Ramsey's testimony insofar as it pertains to the bridge or lack thereof between the original trespass and the culminating demise of the victim of the trespass.*"

The verdict of the jury in favor of the plaintiff eliminates such testimony from consideration by this Court as

a basis upon which to make the factual finding it did let alone a finding as a matter of law against the plaintiff. As it now stands, on what represents a virtually barren record, this Court has concluded as a matter of law that there are children flitting across the entire Pennsylvania Railroad Company's system at virtually every point, and upon that illusory fact it has foreclosed plaintiffs-appellees.

CONCLUSION.

The Petition for re-argument should be granted.

Respectfully submitted,

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APPELLANT'S REPLY TO PLAINTIFFS' PETITION AND BRIEF FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA.

Plaintiffs' petition for reargument is based upon two totally false premises: (1) that this court failed to decide what plaintiffs variously describe as "the only authentic issue . . . the one real issue . . . the genuine issue . . . the one true issue" (Plaintiffs' Petition and Brief, pp. 11-13) in this case; and (2) that the court in some fashion violated plaintiffs' right to trial by jury which is said to arise from the Seventh and Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the Constitution of Pennsylvania.

To establish the first of these false premises plaintiffs were obliged to disregard the thoughtful and complete exposition of the application of Section 339(d) of the Restatement of Torts to the evidence in this case and to quote out of context a single sentence at the end of this discussion which plaintiffs describe as "the alien issue" (Plaintiffs' Petition and Brief, p. 3) upon which the case was decided. Ignoring the fact that the court reviewed all of the decided cases under Section 339(d) in which the principle that the elimination of hazards to trespassing children must be achievable at moderate cost and effort in order to sustain recovery in a case of this kind, plaintiffs charge this court with enunciating a new rule of "public policy" which requires the protection of children to "yield to the countervailing public policy of the freedom of use of land by its possessors." (Plaintiffs' Petition and Brief, p. 5.)

Nothing could be further from the fact. In determining that plaintiffs' evidence [1] was insufficient to create a

1. Repeating a number of the arguments made in their earlier briefs and at the bar of the court, plaintiffs have taken the same liberties with the evidence which provoked the court's comment in footnote 4 of its opinion (see, especially, paragraphs 6 and 7 of the Petition, at pp. 1, 2, and pp. 3, 7 and 12, Plaintiffs' Petition and Brief).

question for the jury under clause (d) of Section 339, this court thoroughly considered the protective measures which plaintiffs contended should have been taken by the railroad company to satisfy the requirements of Section 339(d) and found them to be inordinately burdensome under established precedents ranging from *Tiers v. Pennsylvania Railroad Company*, 292 Pa. 522 (1928), to *Scibelli v. Pennsylvania Railroad Company*, 379 Pa. 282 (1954).

Far from "avoiding" the "true issue" (Plaintiffs' Petition and Brief, pp. 10, 11) in this case, whether the burdensomeness of plaintiffs' theoretical protective measures outweighed the claimed risk to trespassing children, the court squarely decided it.[2]

As for the so-called "inescapable constitutional law dilemma in which," plaintiffs say, "the Court must find itself by reason of its conclusion" (Plaintiffs' Petition and Brief, p. 12), it would perhaps be enough to note that plaintiffs cite neither Pennsylvania nor federal authority for the proposition that a state appellate court's ruling upon the sufficiency of evidence to support a jury verdict is a violation of a constitutional right to trial by jury.[3]

The power of this court to enter judgment notwithstanding the verdict upon its own review of the evidence is no longer open to constitutional attack. This power was created by the Act of May 20, 1891, P. L. 101, Section 2, 12 P. S. 1164. As long ago as 1897, the Act's constitutionality was upheld against the argument that it would be a violation of plaintiff's right to trial by jury under Article I, Section 6 of the Pennsylvania Constitution for the Supreme Court to enter judgment for the defendant after a verdict for the plaintiff. *Nugent v. Phila. Traction Co.*, 183 Pa.

2. That the court wisely considered as well the consequences of a contrary decision upon railroad operations in general is proof of its foresight, not, as plaintiffs say, of its "fail[ure] to face the issue at all" (Plaintiffs' Petition and Brief, p. 9).

3. Plaintiffs' belated attempt to create a constitutional question which does not exist in this case is an obvious effort to contrive some basis for a petition for certiorari to the United States Supreme Court.

142 (1897); see also *Smith v. Times Publishing Co.*, 178 Pa. 481 (1897). Cf. *Stryker v. Montoursville Borough*, 57 Pa. Super. 100 (1914), upholding against a similar attack the Act of April 22, 1905, P. L. 286, sec. 1, 12 P. S. 681, which provided for the entry of judgment n.o.v. by a trial court. Of course, it is so well settled to admit of no respectable controversy that the United States Constitution does not guarantee the right to a jury trial in a state court of a civil action. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211, 217 (1916).[4]

There is no constitutional question or any other question which could profitably be argued in the face of this court's comprehensive opinion. Plaintiffs' petition for reargument should therefore be denied.

Respectfully submitted,

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BARNES, DECHERT, PRICE, MYERS & RHOADS,
Of Counsel.
December 7, 1956.

ORDER DENYING REARGUMENT.

Now, December 21, 1956. Petition denied.

PER CURIAM.

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4. *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U. S. 183 (1956), which seems to be relied on by plaintiffs (Plaintiffs' Petition and Brief, pp. 10, 11), has no bearing at all on this case, for it involved a suit under a *federal* statute in a *federal* court.